(1) No. 96 665 OCT 28 1996

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

ENERGY TRANSPORTATION CORPORATION,

Petitioner,

—v.—

JIMMIE GARNER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In a case involving defense of false swearing which the judge says the jury doesn't believe and which he predicts will result in "enhancing the damages that you are going to pay", is the verdict loser denied a fair trial in the event: (a) after its summation insisting upon the importance of truth telling and explaining why an injury for which damages are thereafter awarded might not have occurred, the judge tells the jury, based upon his "experience" that "lying . . . usually that doesn't happen" because although he or she may "misremember" facts "usually the witness has convinced him or herself [of] what he or she is saying by the time they get on the witness stand"; (b) after the prevailing party claims that an affidavit given "under oath" to his attorney prior to trial is not "truthful" because it impeaches his testimony "in certain material respects" the judge says to the jury that truthful was "a word he didn't understand"; and (c) the judge adds to and distorts the evidence by asking questions designed to have that party withdraw his admission of false swearing and substitute a claim that his affidavit was merely mistaken, with (d) the result that not only this prior inconsistent statement but all such statements are denied impeaching effect?

2. If a motion for a new trial on evidentiary grounds is denied without weighing evidence by a judge who "think[s] the facts are completely different from what [the verdict winner] testified to" but is unable to consider whether testimony essential to the verdict is false because "every human being who has ever lived keeps on reconsidering things and changing their views of what happen[ed]" and therefore misdescription of fact is "not perjury"; and, as a matter of court of appeals law, cannot weigh evidence because not permitted to disagree with any evaluation of witness credibility made by the jury; and as a result its findings of fact are not re-examined although this is a common law protection guaranteed by Rule 59(a) F.R.Civ.P., is the moving party denied U.S. Const. *Amend.* V Due Process of Law?

PARTIES TO THE PROCEEDING BELOW AND RULE 29 DISCLOSURE

All parties to the proceedings below appear in the caption of this case and, pursuant to Rule 14.1(b) of the Rules of the Supreme Court of the United States, need not be separately listed.

Pursuant to Rule 29.6, the following corporations are corporate parents, subsidiaries or affiliates of petitioner Energy Transportation Corporation:

Energy Transportation Group, Inc.
Energy Ammonia Transport, Inc.
Patriot II Shipping Corporation
Patriot III Shipping Corporation
Patriot IV Shipping Corporation
Burmah Gas Transport, Inc.
General Dynamics Corporation
Wilmington Trust Co.
Hull Fifty Corporation
United States Trust Co.
Summit I, Inc.
Summit II, Inc.
Summit III, Inc.
Energy Cherokee I, Inc.
Energy Cherokee II, Inc.
Energy Cherokee III, Inc.
Energy Cherokee IV, Inc.
Energy Cherokee V, Inc.
Bethel Marine, Inc.
Southhold Marine, Inc.
Vermont Marine, Inc.
Apache Marine, Inc.
Blackfoot Marine, Inc.
Navaho Marine, Inc.
Comanche Marine, Inc.
Mohican Marine, Inc.

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OPINIONS BELOW

The order of the Court of Appeals for the Second Circuit denying petitioner's petition for rehearing is reprinted in the Appendix to this petition at 16a. The summary order of the Court of Appeals for the Second Circuit affirming the judgment of the district court is reprinted at 1a-4a. The order of the United States district Court for the Southern District of New York denying petitioner's motion for a new trial pursuant to Rule 59(a) F.R.Civ.P. appears at 5a. The record of oral argument of this motion is reprinted at 6a-13a.

BASIS OF JURISDICTION

This is a seaman's case brought pursuant to the Jones Act, 46 U.S.C. § 688 and General Maritime Law which was tried to verdict March 24, 1995 adverse to petitioner in the United States District Court, Southern District of New York, that court having jurisdiction pursuant to 28 U.S.C. §§ 1331, 1332 and 1333. Judgment was entered April 18, 1995 and on May 5, 1995 petitioner moved pursuant to Rule 59(a) F.R.Civ.P. for a new trial for reason of error by the judge in testifying although he was presiding; and because the verdict was against the weight of evidence and based upon testimony which was false. On September 8, 1995 the motion was denied "for the reasons stated on the record" at oral argument the same day. On September 25, 1995 petitioner appealed to the United States Court of Appeals for the Second Circuit where it renewed its claim of error during trial and also sought to have the court of appeals order a new trial because the judge did not consider the issue of false testimony or otherwise weigh the evidence. On June 25, 1996, the district court's denial of petitioner's motion was in all respects affirmed by summary order. On July 9, 1996, petitioner sought rehearing which was denied by August 27, 1996 order without opinion. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1)

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. CONST. AMEND. V:

No person shall be . . . deprived of . . . property, without due process of law;

U.S. CONST. VII:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Rule 59(a) F.R.Civ.P.:

A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United states.

Rule 605 F.R.Evid.:

The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.

STATEMENT OF THE CASE

During the trial of this case the following occurred: (1) respondent (hereinafter "plaintiff") "totally disagreed with" (A.569)[1] his October 14, 1992 affidavit (18a-19a) which he admitted he had known was a statement given "under oath" (A.631) to his attorney when suit was begun. He did so because, as he conceded, it differed from his testimony at trial "in certain material respects" (A.636); and he thereupon "admitted" that the affidavit's contents were both not "accurate" and not "truthful" (20a); (2) after plaintiff responded "No sir" to petitioner's question whether his affidavit had been "truthful" the court asked: "What do you mean by 'no sir' " followed by: "It was mistaken" and next: "So you did not realize what truthful meant"; (3) when plaintiff answered the last question not by agreeing but by saying "I am confused about that" the court ruled: "That's the end. No more discussion" and moments later, although plaintiff never so testified, told the jury: "It was a word [truthful] he didn't understand" (20a-21a); (4) out of the jury's hearing soon thereafter, the judge, although acknowledging "I think the facts are entirely different from what [plaintiff] testified to", asserted that petitioner was "wrong" to "accuse [ ] [plaintiff] of perjury" by prefacing cross-examination questions with "you allege, you claim" because witness misdescription of fact "is not perjury" since "every human being who ever lived

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[1] The relevant portions of this affidavit and other impeaching documents, as well as plaintiff's testimony and the trial judge's remarks and questions both to the jury and out of its hearing are reprinted in an appendix to this brief and references to them are followed by "a". References preceded by "A" are to the Joint Appendix in the Second Circuit Court of Appeals. What is at issue includes the court of appeals' denial of a district court's power to grant a new trial upon finding testimony the jury believed to be perjury, unworthy of belief, or implausible. Description of some of the trial testimony and other evidence is necessary to show that the verdict was, in fact, based all but exclusively upon plaintiff's contradicted and self-impeached, and at least implausible, testimony.

keeps on reconsidering things and changing their views of what happen[ed]", following which the judge predicted that petitioner's claim that plaintiff's testimony was perjury would result in "enhancing the damages that you are going to pay" (23a); (5) after petitioner had argued in summation that plaintiff's knee injury for which damages are thereafter awarded might not have happened (A.1358) and that the jury "must insist on truth telling" because ". . . telling the truth . . . is the only thing that makes this system work" (A.1392), the judge told the jury that he didn't "like" the word "credibility" because in his "experience" "lying . . . usually, that doesn't happen" and, instead, "usually the witness has convinced him or herself [of] what he or she is saying by the time they get on the witness stand" although they may "misremember" facts (24a-25a), thereby assuring that it would not accept petitioner's claim of plaintiff's perjury.

Plaintiff sought damages as a result of two unwitnessed shipboard "slip-and-fall incidents" the first of which was said to have resulted in injury to his left knee on January 17, 1991. The second occurred on March 13, 1991 as a consequence of which he suffered a fractured elbow. Trial resulted in a jury verdict for $1,100,000, of which $672,000 was awarded for pain and suffering, $128,000 for past lost wages attributed to knee injury alone and $60,000 per year for five years future pecuniary loss which also included nothing for economic consequences of elbow injury. Because plaintiff made liability claims not mentioned when his accidents were reported and only his testimony connected his alleged January 17, 1991 injury and need for knee replacement surgery more than 2 1/2 years later, the condition of his knee upon joining petitioner's vessel, together with the causes of both his shipboard accidents and whether the first even occurred, and if it did what had been its effect, were the questions to which the trial was devoted. Although plaintiff claimed that his fall on January 17, 1991 had been so traumatic that he thought his "leg broke off" (A.518), his wage records showed that he worked 314.5

hours overtime thereafter, including four hours on January 17, 1991, until his elbow fracture less than two months later. What he alleged had caused both incidents was impeached by his signed Injury Report statements—he substituted for the naturally occurring conditions reported aboard ship (wind for the first (26a) and "heavy dew . . . and salt on the deck from washing down" for the second (A.1563)), claims contradicted by petitioner's witnesses and supported only by his testimony that the chief mate and master had admitted liability for grease or oil on deck caused by leaking winches as well as alleged absence of "non-skid" paint (see, e.g., A.184, A.382-3, A.386 and A.395). What was most badly impeached by his prior inconsistent statements was plaintiff's claim dependent upon his description of symptoms alone of connection between injury to his knee aboard ship and need for disabling surgery, a fact establishing that in this case the evidence cannot be weighed without considering the question of false swearing.

The jury found causal connection between plaintiff's shipboard knee injury and knee replacement surgery performed on October 5, 1993 although he had an arthritic left knee no later than January 16, 1989 which he admitted he had "twisted" (A.342-3) in late December 1990 as a result of a fall off a porch at his mother's home after he had been physically examined by his union and before flying out on January 2, 1991 without being re-examined to join petitioner's vessel in Japan. The surgeon who treated him beginning March 19, 1991 and performed knee replacement surgery testified as plaintiff's only medical witness. He said it would be "difficult" and "complicated" to attribute need for that surgery—which the doctor testified would have been inevitable within "five or ten years" (A.992) solely due to arthritis existing in 1989 and which, because plaintiff was a seaman, would be disabling when performed—to his January 17, 1991 alleged injury aboard ship in the event his knee injury at home had been the cause of "symptoms . . . [which] . . . were ongoing" (A.1107). On March 29, 1991 his surgeon referred plain-

tiff to a physiotherapist who obtained a history, not of an injury occurring aboard ship in January 1991, but: "Pt [patient] . . . states that he twisted his leg back on December of 1990, continued to have problems with it . . ." (29a). Plaintiff testified to the contrary, that his fall at home—which he characterized as "such an incidental accident . . . it was not recognizable to this day" (A.499) because causing no pain when it occurred and resulting only in "a slight swollen knee" the next day (A.503)—had been the source of no symptoms as of January 8, 1991 (A.355), a fact which his doctor, in testifying to causal connection, assumed (A.983-4). Plaintiff's testimony regarding the effect of his injury before joining was contradicted by the vessel's master who testified that when plaintiff signed articles January 4, 1991 his left knee swelling was visible through his pants (A.1200) and that plaintiff successfully "pleaded" with him not to be sent ashore for examination in Japan because if he had been found not fit the result would be "financially a disaster" (A.1200-1). The chief mate testified that upon his examination on January 6, 1991 and thereafter before plaintiff's January 17, 1991 shipboard fall, plaintiff's left knee was "very badly swollen" (A.160-1, A.170-1) and was in such "terrible shape" (A.196) as to cause the mate, upon his examination two days before symptoms from injury before joining allegedly disappeared, to put plaintiff on "light duties" and advise him to "stay off knee as much as possible" (28a), despite which he refused to see a doctor upon the vessel's arrival on January 13, 1991 at a port in Indonesia (A.160-1).

Plaintiff's claim of insignificant injury at home causing no symptoms more than a week before his January 17, 1991 knee injury was impeached by the report of injury prepared aboard ship (26a-27a), the entry in the ship's medical log (28a) describing the condition of his knee before that injury and his affidavit (18a-19a). In the report of his first injury plaintiff admitted he had "sprained" his knee in his fall off the porch and that this injury had been "aggravated" when he "fell down

on the deck again twisting . . . [his] . . . leg" (26a-27a). At trial plaintiff claimed that he had signed this report when it was blank (A.376-9) just as he said essentially the same thing about the ship's accident report prepared after his elbow injury (A.412-3) which his testimony also contradicted. Why he would have signed the ship's medical log although doing so acknowledged as he knew (A.1577) that his knee was "sprained" and "swollen" on January 6, 1991 was also explained—plaintiff testified that he had done so on January 22, 1991 believing it was a "consolidated" entry reflecting his mere request to the mate for Ibuprophen tablets which had been left on his desk on January 6, 1991 and examination and treatment only after his January 17, 1991 alleged fall (A.397). Plaintiff's testimony was even more emphatically impeached by the affidavit given to his attorney which was prepared after he had obtained his "complete file" concerning both accidents (21a-22a). In this affidavit plaintiff stated: "On 1/6/91, I mentioned to the chief mate that I had injured my knee at home and . . . [it] . . . was swollen" although, because offering support for his claims that the accident report was blank when he signed it and contrary to what was stated in the medical log that his knee had not been examined aboard ship before January 17, 1991, denying that he had (A.628-30). Although in his affidavit plaintiff also admitted that he had been given an Ace bandage for his swollen knee on January 6, 1991, he claimed at trial that on that date it only "might have still [had] some slight swelling" (A.355) and that he had been given one for the first time only after January 17, 1991 (A.374-5); and in it plaintiff asserted, because of the condition of his knee four days *before* the occurrence of his alleged knee injury aboard ship, that his "employer was negligent . . . in allowing me to stay on the ship after 1/13/91". In his complaint, "Count" I, para. 4 and "Count" IV, para. 2, plaintiff alleged "aggravation of a previous injury" and claimed that "damages resulted from defendant's failure to provide adequate medical assistance" thereby adopting his injury report "aggravation" admission and the description of the

condition of his knee on January 6, 1991 contained in the medical log. Nevertheless, he testified that when the chief mate inexplicably asked him on January 13, 1991 when the vessel reached Indonesia whether he wanted to go to a doctor ashore for examination he "pulled up . . . [his] . . . britches" and the mate remarked that his knee "looks okay to me" (A.360), thus establishing that the claim by affidavit that petitioner had been "negligent . . . in allowing me to stay on the ship after 1/13/91" as well as plaintiff's never amended complaint allegations cannot be reconciled with his testimony which the jury accepted. In fact, his testimony disagreed even with his doctor's records and testimony. In order to avoid claim of failure to follow medical advice plaintiff testified that the fracture fragment in his elbow displaced during physiotherapy (A.446-7) "along summer, the latter part of it" when his doctor "recommended that I needed to have a pin put in there" in response to which he allegedly said ". . . look, I'm getting ready to go back to sea, I've got to go back to work" (20a). To the contrary, some slippage occurred no later than March 29, 1991 and plaintiff refused to have internal fixation at that time (29a, 30a), 4 1/2 months before he returned to sea on August 10, 1991 (A.447). Why his testimony was believed is apparent from the fact that the court explained how plaintiff's contradictory affidavit did not impeach his testimony by establishing that it was only "mistaken"; and that the shipboard records he signed were also without impeaching effect because each had been explained by his testimony which the judge, by pledging his "experience", told the jury not to believe was false.

Petitioner's Rule 59(a) F.R.Civ.P. motion was based upon violation of *Quercia v. United States*, 289 U.S. 466 (1933) because the trial judge testified; and on evidentiary grounds because plaintiff's testimony was incredible and, hence, without weight. During oral argument, the judge ignored the fact that he had told the jury that "[i]t was a word [truthful]" [plaintiff] "didn't understand" and ruled, with respect to his

"comments" just prior to his instructing the jury: "I put that in every charge I have given since I have been on the bench and so far I haven't been reversed . . . and I don't think it (sic) will be this time" (7a). With respect to weight of evidence, the court stated: "Don't argue that point" (7a) and by order the same day denied petitioner's motion "for the reasons stated on the record" (5a) during oral argument without having given any reason other than confidence that he would not be reversed. Upon appeal, petitioner again argued that the judge had testified and that this error violating Rule 605 F.R.Evid. as well as *Quercia*, *supra*, required a new trial on all issues. Because the trial judge had "resolutely failed" to consider the "law on the weight of evidence" (Brief, 1/24/96, pps. 43-44) although during trial he had observed that the facts were "entirely different from what . . . [plaintiff] . . . testified to" and had admitted that he could not consider fairly the issue of witness perjury, petitioner also questioned "whatever may be the rule in an ordinary case regarding court of appeals' review of a grant or denial of motion for a new trial" whether the court of appeals had to "review the weight and, hence, credibility of evidence" since "for the . . . [Second Circuit] . . . not to would deprive defendant of the protection of Rule 59 F.R.Civ.P. if not its U.S. Const. *Amend.* VII right to trial by jury, including the right to have facts tried to a jury re-examined . . . 'according to the rules of the common law' " (Brief, 1/24/96, Questions Presented No. 5). It asserted that the trial judge's power to grant a new trial based upon the evidence ". . . acts as a deterrent to interested party tendency '. . . to keep[ ] on reconsidering things and changing their views of what happens' in order to falsely put the case in a more favorable light". Petitioner argued that a trial judge in considering a motion for a new trial addressed to the evidence ". . . must independently assess the credibility of witnesses" and must "set aside a verdict . . . when in his opinion it is contrary to the clear weight of evidence, or is based upon evidence which is false". It argued further because of the trial judge's failure to assess weight of evidence and his inability

to consider witness credibility: "Rule 59 F.R.Civ.P. requires this Court to itself consider the weight and credibility of evidence and grant a new trial" (*Ibid.*, pps. 44-46).

The court of appeals affirmed after noting that "defendant primarily argues that a new trial is required on the ground that the district judge 'testified' in connection with the defendant's cross-examination of the plaintiff and during the court's charge addressing witness credibility". By holding: "Although this trial may not have been error free, the defendant is entitled only to a fair trial, not a perfect trial" as well as "[I]t is well established that a judge may ask questions of a witness that may aid the understanding of the jury", the court of appeals rejected petitioner's claim of error resulting from the district court's testifying because the trial judge "did not step across the line and become an advocate for one side" with the result that "the judge's comments, while less than desirable, did not compromise the fairness of the trial to defendant". It did not discuss petitioner's appeal from the district court's denial of its motion for a new trial on evidentiary grounds, and upon finding that the amount of the verdict did not shock its conscience, held every other issue petitioner raised to be "without merit". In seeking rehearing petitioner argued that affirming a denial of a new trial without the trial judge or the court of appeals having considered weight or credibility of evidence represented abrogation of a traditional common law protection which, by virtue of *Honda Motor Co. v. Oberg*, 512 U.S. ___, 114 S.Ct. ___, 129 L.Ed.2d 336 (1994), constituted a U.S. Const. *Amend.* V Due Process violation. It also argued that the court of appeals, to avoid such a result, had itself to grant a new trial; or if it should determine that he was capable of assessing credibility despite his belief in what witnesses usually do, remand to the trial judge for reconsideration of petitioner's motion under the standard established by cases approved in *Gasparini v. The Center for the Humanities*, U.S. Sup. Ct. No. 95-719 (June 24, 1996); 1996 U.S. LEXIS 4051; 64 LW 4607, (Pet. for Reh., pp.15).

It also asserted that ". . . the district court responded when perjury was established by denying that it had or could happen, with the result of taking steps to assure that it would succeed" and that "[m]ost unfortunately . . . [the court of appeals'] . . . reaction so far has been identical" (Pet. for Reh., pp.14). In denying its petition for rehearing, the Second Circuit refused to consider whether its affirmance, which excused not only the trial judge's testifying but also his inability to find any witness' testimony to be false and his refusal otherwise to consider weight, would have the effect of encouraging false swearing. The reason would appear to be that the court of appeals' view of what constitutes "weight" of evidence and "abuse" of discretion in granting a new trial motion addressed to the evidence, however unintentionally, achieves the same result.

ARGUMENT

A. Introduction

In the Second Circuit, new trial grants are subjected to appellate review the effect of which is to bar rejection of verdicts finding liability or awarding damages for disputed injuries through substitution of the Rule 50(b) F.R.Civ.P. standard of legal sufficiency for Rule 59(a) F.R.Civ.P. weight of evidence in both the district court and court of appeals. Why it and all other courts of appeals in defiance of this Court's precedent should have created their power to review; and the Second Circuit and some others rendered district courts defenseless in the face of perjury, is not easily accounted for. Since when a Rule 59(a) F.R.Civ.P. motion is granted because based upon false testimony reversal in that and other circuits is today certain, the Second Circuit's rule means that jury determinations of fact where weight of evidence cannot be distinguished from truthfulness of testimony, on any issue other than excessiveness or inadequacy of damages, are final. Such a result in civil cases is so extreme as to seem more than

the product of a mistake of analysis and, if this is so, can be thought to be the result only of inappropriate confidence in witness honesty or misplaced concern for "judicial economy". What is assured in light of the courts of appeals' view of their power and the limits imposed as a result of its exercise is that it would indeed be better if, in fact, "lying . . . usually that doesn't happen". It is, therefore, reasonable to conclude that excusing the trial judge's error testifying was necessary because what he told the jury is what the Second Circuit also assumes—it, too, may believe that since reconfigured recollection is "not perjury" every verdict can be assumed to be ethically neutral. Surely, the trial judge's credulity should be shared if that court believes that judicial conscience should not be shocked by jury acceptance of testimony believed to be perjury; or if, as its decisions in effect hold, no verdict based upon sufficient evidence other than one which is excessive or inadequate can be called a miscarriage because justice is whatever the jury finds the facts to be. Every error in this case may, alternatively, have arisen from belief by the trial judge and the court of appeals that whether testimony, in a simple but "highly disputed" case such as this one, is merely reconfigured recollection or is perjury is not important because in neither instance can either do anything about it. A rule making a new trial grant an abuse of discretion if the trial judge rejects a verdict because of disagreement with the jury's evaluation of credibility means that testimony no matter how badly self-impeached has the same "weight" as evidence which is not impeached at all; and this might explain why the court of appeals refused to itself grant a new trial based upon the evidence or to remand for consideration under the correct standard requiring the trial judge to independently assess the truthfulness of the testimony the jury believed. If in the Second Circuit *no* judge can consider credibility of witnesses on a new trial motion addressed to the evidence, whether a particular judge is unable to find testimony not to be truthful for reason of personal belief is of no significance, of course. Denying a district court this power would, moreover, be a

direction from the Second Circuit not to consider whether testimony the jury heard was false, which is the same thing the trial judge told the jury; and the former would have the identical apparently unforeseen potential of encouraging false swearing as the latter. Thus, whether or not resulting from shared belief as to what witnesses usually do, excusing the district court's "comments" is related to the court of appeals' view of weight of evidence and what constitutes abuse of a trial judge's discretion; and both, no doubt, reflect the hostility of the Second Circuit to retrials whatever the grounds.

There is, therefore, a third issue which this petition raises—whether the judge's belief informs or reflects the Second Circuit's view of what constitutes testimonial weight and, with that, abuse of discretion in deciding a motion pursuant to Rule 59(a) F.R.Civ.P., for if it does, it cannot be expected that he would be reversed for telling the jury either the actual basis of a rule of court of appeals' creation or something, for reason of that rule's impact, which it should believe. That it may is shown by the fact that this Court has "emphasized the duty of the trial judge to use great care that an expression of an opinion upon the evidence should be so given as not to mislead, and especially that it should not be one-sided; that deductions and theories not warranted by the evidence should be studiously avoided . . . [and that a trial judge] . . . may not charge the jury upon a supposed or conjectural state of facts, of which no evidence has been offered". *Quercia v. United States*, *supra*, 289 U.S. at 470. Thus, the trial judge's "comment" regarding what witnesses "usually" do in his "experience" had to be found by the court of appeals to be error because it surely is both a "theor[y] not warranted by the evidence" and a "conjectural state of facts" for which there can be no competent proof. Because the court of appeals did not so find and no trial judge in the Second Circuit no matter how convinced of interested witness perjury can reject a jury's verdict by disagreeing with its evaluation of credibility; and, hence, cannot in any case where weight of evi-

dence is not independent of witness truthfulness grant a new trial, why affirmance without the facts being re-examined violated Rule 59(a) F.R.Civ.P. and, hence, represents a denial of Due Process—although an issue this Court might not reach—will be described first.

B. The Judgment Could Not Be Properly Affirmed Even Had There Been No Error During Trial

It has always been law that the courts of appeals cannot re-examine facts found by a jury and as a result determinations of new trial motions addressed to weight of evidence on any issue other than excessiveness or inadequacy are not reviewable. *Parsons v. Bedford*, 3 Pet. 433, 447-9 (1830); *Fairmont Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474, 481-82 (1933); *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 254 (1940); *Portman v. American Home Prods., Inc.*, 201 F.2d 847, 848 (2nd Cir. 1953, L. Hand, J.). Because the Seventh Amendment adopted common law of England in respect of trial by jury as it existed in 1791 (*Dimick v. Schiedt*, 293 U.S. 474, 477-78 (1935)), it has also always been law, as was recently reaffirmed in *Gasparini*, *supra*, 64 LW at 4612, that a trial judge has the same "large" discretion pursuant to Rule 59(a) F.R.Civ.P. as English common law trial courts had to grant a new trial "with a view to the attainment of justice" which the U.S. Const. *Amend.* VII re-examination clause does not "inhibit" because not in derogation of the right to a trial by jury but, instead, its historic safeguard (*Aetna Cas. & Surety Co. v. Yeatts*, 122 F.2d 350, 353 (4th Cir. 1941)). As this Court also recently acknowledged, the trial judge has a *duty* to set aside a verdict "if it should clearly appear that the jury have committed gross error" (*Blunt v. Little*, 3F.Cas. 760, 761-62 (Case No. 1,578) (CC Mass. 1822)) or if "the verdict appears to [the judge] to be against the weight of the evidence" (*Byrd v. Blue Ridge Rural Elec. Cooperative, Inc.*, 356 U.S. 525, 540 (1958)). Not mentioned in *Gasparini* is the fact that because "weight" of evidence cannot except in unusual

cases be considered without reference to witness truthfulness, it has always been thought that the trial judge had to make an independent assessment of credibility and needn't consider the evidence in a light most favorable to the verdict winner. This view is reflected even in recent cases. See, e.g., *Bevenvino v. Saydjari*, 574 F.2d 676, 684 (2nd Cir. 1978) (in deciding a new trial motion the trial judge considers "character of the evidence"); *Ryan v. McDonough Power Equip*, 734 F.2d 385, 387 (8th Cir. 1984); *Gill v. Rollins Protective Services Co.*, 773 F.2d 592, 595 (4th Cir. 1985); *Payton v. Abbott Labs*, 780 F.2d 147, 152-53 (1st Cir. 1985); *Swentek v. USAIR, Inc.*, 830 F.2d 552, 559 (4th Cir. 1987); *White v. Pence*, 961 F.2d 776, 780 (8th Cir. 1992); *Thomas v. Stalter*, 20 F.3d 298, 304 (7th Cir. 1994). Moreover, because judgment n.o.v. involves issue of sufficiency of evidence and a motion for a new trial its weight, there is no doubt "[e]ach . . . has its own office". *Montgomery Ward & Co. v. Duncan*, *supra*, 311 U.S. at 251. There has also never been doubt until recently that a trial judge must "exercise unflinchingly" his or her power to set aside a jury's verdict if concluding that it was based upon testimony which is false. *Aetna Cas. & Surety Co. v. Yeatts*, *supra*, 122 F.2d at 353; *Dellaripa v. New York, New Haven & Hartford R. Co.*, 257 F.2d 733, 735 (2nd Cir. 1958) (when the result may be based on false swearing the trial judge cannot "hid[e] behind the jury's verdict").

All courts of appeals to some extent now disagree and some, including the Second Circuit, disagree totally. The error in affirming denial of petitioner's motion on evidentiary grounds arose from the view that it is necessary, although a new trial grant means trial by another jury, for the courts of appeals to intervene in order to prevent the "injustice" of depriving the prevailing party of his or her liability verdict because doing so "effects a denigration of the jury system" and as a consequence "close [appellate] scrutiny is required to protect the litigant's right to trial by jury". *Lind v. Schenley Industries, Inc.*, 278 F.2d 79, 87-90 (3rd Cir. 1960).

Although appellate review of new trial determinations for reason of the evidence was limited by *Fairmont Glass Works Co. v. Cub Fork Coal Co., supra*, 287 U.S. at 482-83 to instances where the motion was denied for mistake excluding evidence or concerning the extent of the trial judge's discretion or authority, granting a new trial was found in *Lind* to be an abuse of discretion because the verdict was based upon legally sufficient evidence and for that reason depended upon the jury's assessment of credibility with which, as the dissent established, the trial judge had reason to disagree (278 F.2d at 92). This view, which the *Lind* dissent also recognized as "impinging upon the function and discretion of the trial judge in a way that is serious, regrettable and without precedent in this court", appears to create a contradiction. Such a determination cannot be reviewed, presumably in part because reexamination of facts including credibility is a task only the trial judge who observed demeanor can effectively perform; but in doing so his or her discretion is abused whenever the verdict is rejected because of jury mistake of weight if it involves credibility. Obviously, if abuse is established upon showing as "special or unusual circumstances" (278 F.2d at 88) only that the judge disagreed with the jury's credibility assessment, *every* new trial grant is reviewable. *Lind* also approved error expressed in *Pelham v. Hendricks*, 132 F.Supp. 774, 775 (D.C. Pa. 1952) that in considering a motion for a new trial based upon claim that the verdict is against the weight of evidence "[t]he evidence and inferences . . . must be viewed in the light most favorable to the prevailing party . . ." (278 F.2d at 89), the standard employed on motion for judgment notwithstanding the verdict pursuant to Rule 50(b) F.R.Civ.P.

Some limitation of a trial judge's Rule 59(a) F.R.Civ.P. discretion in weight of evidence cases is, in fact, unavoidable if denials or grants of new trials can be reviewed by the courts of appeals at all; and it is abolished where issues of liability depend upon testimony if it is an abuse to disagree with the

jury's evaluation of credibility. The Second Circuit as well as other courts of appeals have all but stated they review not for weight but for sufficiency as if considering an appeal from an order pursuant to Rule 50(b) F.R.Civ.P. See, *Binder v. Long Island Lighting Co.*, 57 F.3d 193, 202 (2nd Cir. 1995) ("For the reasons [among others] stated . . . in our reversal of the instant grant of judgment n.o.v. . . . the verdict . . . was clearly not seriously erroneous"); *Dunlap-McCuller v. Reise Organization*, 980 F.2d 153, 157-158 (2nd Cir. 1992); *Hill v. Winn-Dixie Stores, Inc.*, 934 F.2d 1518, 1527 (11th Cir. 1991) ("our reasons for reversing the judgment notwithstanding the verdict . . . also support our conclusion that the jury verdict . . . was not contrary to the weight of evidence"); *Blake v. J.C. Penny Co., Inc.*, 894 F.2d 274, 281 (8th Cir. 1990) (conditional new trial grant reversed because based upon same grounds as erroneous grant of judgment n.o.v.) and the effect of its own statements causing confusion has been acknowledged by a court of appeals which later held that a motion for judgment despite the verdict and for a new trial are wholly separate. See, *White v. Pence*, 961 F.2d 776, 779, n.5 (8th Cir. 1992) ("We recognize that some of our cases . . . may give an impression that the same standards govern consideration of both motions for judgment notwithstanding the verdict and for a new trial"). Moreover, when a new trial is granted a "more exacting" or "more probing" review results and if granted because the verdict is against the weight of evidence a "still more rigorous" standard is applied (*National Services Industries, Inc. v. Hartford Acc. & Indem.*, 661 F.2d 458, 461 (5th Cir. 1981) (Unit B); *Matter of Innovative Const. Systems, Inc.*, 793 F.2d 875, 888 (7th Cir. 1986); *Latino v. Kaizer*, 58 F.3d 310, 314 (7th Cir. 1995)), thus demonstrating, not only as will be shown that credibility determinations are unnecessary to "rigorous" review but also, because what is the weight of the evidence is the same when the motion is granted or denied, that what the courts of appeals consider is other than weight. Similarly, many cases hold that before a trial judge can grant a new trial he or she must find that the verdict

is not just against the weight of evidence, i.e., outweighed by contrary evidence which is only more probative or believable, but against the "great" or "overwhelming" weight (see, e.g., *Firemans Fund Ins. Co. v. Aalco Wrecking Co.*, 466 F.2d 179, 187 (8th Cir. 1972) quoting *Cities Service Oil Co. v. Launey*, 403 F.2d 537, 540 (5th Cir. 1968); *Williams v. City of Valdosta*, 689 F.2d 964, 973 (11th Cir. 1982); *White v. Pence*, *supra*, 961 F.2d at 780), thereby showing that if the new trial standard is not sufficiency it is something approaching it. Despite cases stating that a trial judge has plenary power in re-examining facts found by a jury, it is what the courts of appeals hold constitutes abuse of discretion which establishes just how circumscribed the "weighing process" actually is.

The fact the trial judge did not consider either weight or credibility is established by Second Circuit law and not just by inference from his comments regarding what witnesses usually do and the fact that he refused to hear argument on petitioner's motion addressed to the evidence and failed to give any reason for its denial despite his observation: "I think the facts are entirely different from what . . . [plaintiff] . . . testified to". In the Second Circuit, the trial judge, who can re-examine facts found by a jury cannot while the court of appeals, which according to long-established law may not and admittedly is unable to do so effectively, can; but only when the motion is granted (*Binder v. Long Island Lighting Co.*, *supra*, 57 F.3d at 201) and not when it is denied (*Stonewall Ins. Co. v. Asbestos Claims Management*, 73 F.3d 1178, 1199 (2nd Cir. 1995)), a view of a court of appeals' power which encourages offer of testimony which is perjury. New trial grants are reviewed in cases where weighing requires determination of credibility which the Second Circuit has admitted it cannot decide. See, *Dunlop-McCuller v. Riese Organization*, *supra*, 980 F.2d at 158: ("Unlike the district court, we cannot make determinations concerning a witness' credibility"). See also, *Green v. American Airlines, Inc.*, 804 F.2d 453, 455 (8th Cir. 1986) (reviewing a denial of a new trial on

evidential grounds "would engage us in the weighing process that is properly within the province of the district court")). Because the standard upon appeal has to be the same as the trial judge applies (see, *Dunlap-McCuller v. Riese Organization, supra*, 980 F.2d at 161 (concurring op. Walker J.)), for the appellate courts to have the ability whether or not permitted by law to reverse a new trial grant the district courts must also be unable to consider credibility of evidence. It, therefore, has to be an abuse for a trial judge to reject a jury's evaluation of the truthfulness of any witness it heard; and if so, only sufficiency can be considered by the trial judge in determining a motion pursuant to Rule 59(a) F.R.Civ.P. directed to the evidence where its weight cannot be considered without reference to the credibility of the witnesses who offered it.

In the Second Circuit a trial judge in considering a motion for a new trial in such a case can search only for legally sufficient evidence: A grant of a new trial, if it requires rejection of any jury finding of credibility, *is* an abuse of discretion. *Sorlucco v. The City of New York*, 971 F.2d 864, 875 (2nd Cir. 1992), reversing a grant of a new trial on liability on grounds that the winner was guilty of perjury because the verdict depended upon "a matter of credibility for the jury to resolve", no ". . . contradictory evidence subsequently . . . [came] . . . to light revealing a perjury that would warrant a new trial" and jurors are "free to settle upon which witness[es] they believe[ ]". Other circuits agree: *Redd v. City of Phenix City*, 934 F.2d 1211, 1215 (11th Cir. 1991) ("[w]hen there is some support for a jury's verdict it is irrelevant what we or the district court would have concluded"); *Latino v. Kaizer, supra*, 58 F.3d at 313-317 (trial judge's disagreement with the jury's fact finding "implicated" *Amend.* VII and requires reversal for "clear abuse of discretion" whenever the case boils down to "a swearing contest" because "credibility of witnesses is peculiarly for the jury"; decision to grant a new trial based upon the trial judge's view of the "most rea-

sonable inferences from the evidence . . . flies in the face of the Seventh Amendment, and goes beyond the power of the district judge under Rule 59" in the event the testimony upon which the verdict was based was not "so physically impossible or contrary to the evidence as to provide a legitimate basis for in effect excluding it from the jury's consideration"); *Williamson v. Consolidated Rail Corp.*, 926 F.2d 1344-1352 (3rd Cir. 1991) (reversal of an order granting judgment n.o.v. "require[s]" consideration of a conditional new trial grant on evidentiary grounds although adoption of F.R.Civ.P. 50(c)(1) did not enlarge the scope of appellate review (see, *Akermanis v. Sea-Land Service, Inc.*, 688 F.2d 898, 904 (2nd Cir. 1982)); new trial discretion is of "limited nature by virtue of the Seventh Amendment"; court of appeals, itself unable to assess credibility adequately and owing "deference" to the trial judge's evaluation of weight of evidence, reviews in order to determine whether it "could have [been] reasonably concluded that miscarriage [of justice] would occur if verdict were left to stand"; miscarriage must appear "on the record" and therefore must be provable as opposed to believed even to the point of conviction; interested witness testimony of absence of symptoms prior to occurrence of what may have been either an aggravation or a re-injury means massive contrary medical evidence cannot be said to preponderate because when "the litigation is . . . within a layman's understanding"—as liability in injury cases and connection between injury and damages are—the trial judge "is given less freedom to scrutinize the jury's verdict"); *United States v. Kuzniar*, 881 F.2d 466, 470-71 (7th Cir. 1989) (In criminal cases "district courts may take testimony away from the jury" only when it is such "that reasonable men could not have believed it" and can grant a new trial because a verdict is against the "weight of evidence" only if the testimony supporting it is proven to be a physical impossibility since "a question as to the credibility of a witness . . . [is] . . . not sufficient grounds for granting a new trial").

Substituting the Rule 50(b) F.R.Civ.P. sufficiency standard for Rule 59(a) F.R.Civ.P. weight of evidence is, however, avoided in other circuits by a process which is more illusory than real. Some allow the trial judge to consider credibility of witnesses but then guide exercise of his or her discretion in a way which does not permit grant of a new trial in any case in where there has been a comprehensive dispute of fact. See, *Williams v. City of Valdosta*, *supra*, 689 F.2d 964 at 973, n.7, 976 ("Apparently, there is disagreement over whether the trial judge is permitted to make credibility choices when weighing all the evidence" and although holding he or she can: "In our view, the authorities suggest that the trial judge should not substitute his own credibility choices and inferences for the *reasonable* credibility choices and inferences made by the jury; "greater deference" owed a jury verdict when the trial involves "simple issues" and "highly disputed facts" but "trial courts have more freedom" to grant a new trial in cases involving "complex issues" and facts which are "not highly disputed"; to reject a jury verdict trial judge must find it "contrary to the great and not merely the greater, weight of evidence"; review for abuse "more stringent" or "stricter" when motion is granted and reversal required when court of appeals concludes that " 'there *is* no great weight of the evidence in any direction' "). See also, *Freeman v. Package Machinery Co.*, 865 F.2d 1331, 1333-34 (1st Cir. 1988) (new trial proper if based upon "clear" weight finding or that testimony was false but where weight is not "grotesquely lopsided, it is irrelevant that the judge . . . would likely have found otherwise").

Not every court of appeals agrees or goes as far. See, *Swentek v. USAIR, Inc.*, *supra*, 830 F.2d at 559 (proper to set a verdict aside in part based upon trial judge's own credibility determinations); *Moxness Products, Inc. v. Xomed, Inc.*, 891 F.2d 890, 893 (Fed.Cir. 1989) (judge must find verdict contrary to "great weight" of evidence but new trial grant affirmed although court of appeals not persuaded that stan-

dard had been met because district court assessed demeanor of a witness essential to the verdict and found "his testimony could not be reconciled with the documentary evidence"); *White v. Pence*, *supra*, 961, F.2d at 782 (trial judge able to reject a verdict by "great weight" standard but in weighing evidence may exclude testimony if found to be perjury, unworthy of belief or implausible). Remarkably, the Second Circuit claims that new trial denials are not reviewable because considering the entire trial record is not a task it should be required to perform (*Stonewall Ins. Co. v. Asbestos Claims Management*, *supra*, 73 F.3d at 1199) although this is a burden it volunteers to shoulder when the motion is granted; but not, of course, when based upon rejection of the jury's credibility finding because that fact alone requires reversal. More remarkably, although the Second Circuit holds that new trial denials based on weight are unreviewable and the Eighth Circuit has held that the Seventh Amendment bars appeal from a denial and observed that there had been, in any event, no case where a denial of a new trial on liability was ever reversed (*Green v. American Airlines, Inc.*, *supra*, 804 F.2d at 455), since adoption of rules barring trial judges from disagreeing with jury evaluation of credibility of evidence or limiting exercise of his or her discretion, a denial *has been* reversed (*Insurance Co. of No. America v. Valente*, 933 F.2d 921 (11th Cir. 1991)). This shows that the Eleventh Circuit's rule of "more exacting" scrutiny and its standard of "great" or "overwhelming" weight assures that new trials will not be ordered when they should by trial judges permitted to independently evaluate credibility, with the result either that an injustice must be accepted because such a ruling is unreviewable or unnecessary work for the courts of appeals. It appears that most courts of appeals discourage new trial grants by threatening reversal through exercise of the right to review and most seem united in the belief that it is better if a motion for a new trial addressed to the evidence is denied in error instead of mistakenly granted, despite the fact that if there were a presumption that a verdict is not mistaken it

"falls out of the case" when the judge finds that there is sufficient evidence justifying the contrary conclusion that it is. See, *DelVecchio v. Bowers*, 296 U.S. 280, 286 (1935); F.R.Evid. 301. Thus, in *Williams v. City of Valdosta*, *supra*, 689 F.2d at 974, n.8 it was said: "[W]hen the trial judge dismisses a jury verdict solely because in his view the evidence was [of] insufficient [weight], it is *more likely* that he has abused his discretion" although what the law presumes is not that a particular verdict is or is not mistaken but that jury verdicts in civil cases will be less often mistaken than judges' decisions; and ". . . the end that the truth may be ascertained and proceedings justly determined" (F.R.Evid. 102) is no less the aim in determining new trial motions than in admitting or excluding evidence. All this is said to be justified because forbidding or discouraging new trial grants is required in order to "protect a party's right to a jury trial" (*Dunlap-McCuller v. Riese Organization*, *supra*, 980 F.2d at 160, concurring op. Walker, J.); *Green v. American Airlines*, *supra*, 804 F.2d at 455, n.2; *Lind v. Schenley Industries, Inc.*, *supra*); or to "protect the role of the jury"; (*Hewlitt v. B.F. Goodrich Co.*, 732 F.2d 1554, 1556 (11th Cir. 1984); *Redd v. City of Phenix City*, *supra*, 934 F.2d at 1214-5); or in order to avoid ". . . destroy[ing] the role of the jury as the principal trier of facts" by "enabl[ing] the trial judge to disregard the jury's verdict at will" (*White v. Pence*, *supra*, 961 F.2d at 780)).

The first two are justifications which, in *Gasparini*, this Court, by approving *Aetna Cas. & Surety Co. v. Yeatts*, *supra*, held are wrong and the remaining question is whether all of the means employed and every justification offered resulting in "protection" from the trial judge's exercise of his or her Rule 59(a) F.R.Civ.P. duty—whose Seventh Amendment re-examination clause role is either abolished or diminished—are also mistaken. They apparently are. Excusing on *any* basis the trial judge's duty to grant a new trial when he or she is convinced the verdict is against the simple weight of evidence on a crucial issue and as a result is "gross error" was seem-

ingly recognized in *Gasparini* to be mistaken by approval of *Blunt v. Little*, *supra*. Thus, law of the Second Circuit holding that a trial court abuses its discretion if it disagrees for any reason other than newly discovered evidence with a jury's credibility assessment is not just error it represents a violation of U.S. Const. *Amend.* V Due Process of Law no different than found by this Court in its *Amend.* XIV decision, *Honda Motor Co. v. Oberg*, *supra*. Moreover, if re-examination "according to the rules of the common law" requires a new trial to be granted if only jury mistake of weight or credibility is "gross error" which "clearly appears" when the facts including credibility of witnesses are considered, so would the rule of any circuit which relies upon any presumption or policy to guide a trial judge's discretion.

C. Denial of The Motion for a New Trial Based Upon Error During Trial Was Error

This case makes clear that the Second Circuit's hostility to new trial grants extends to fair trial questions. In order to affirm, that court had to contradict Rule 605 F.R.Evid., *Quercia v. United States*, *supra*, and its correct reading of it but six months before. Especially since in the Second Circuit jury determinations of credibility are final, fundamental notions of fair play and essential justice would require it to hold a comment by a trial judge to a jury in a case where the facts are highly disputed, directed in any way to credibility on an important issue, be found error which is prejudicial unless it can be shown conclusively that it was not. Nevertheless, the court of appeals held that what the trial court said to the jury was neither a violation of Rule F.R.Evid. 605 nor of *Quercia*, *supra*, which, in the case which it cited but failed to follow, *United States v. Filani*, 74 F.3d 378, 384 (2nd Cir. January 11, 1996), it correctly read as holding: (1) a judge may not "assume the role of a witness"; (2) may "not add to or distort the evidence"; and (3) cannot "comment in a one-sided manner". In rejecting defendants' appeal it described the trial

judge's testimony as "comments" although it was he who told the jury that plaintiff did not understand what "truthful" meant and without benefit of what he said was his "experience" it would surely not have known that "lying . . . usually that doesn't happen". With respect to the alleged comments during cross-examination and a trial judge's right to ask "questions of witnesses that may aid the understanding of the jury", the court of appeals found no error although the judge certainly added to or distorted the evidence since each question he asked was intended to alter the clear testimony which plaintiff had just before given. When the plaintiff did not agree with the court's explanation of the excuse for his alleged false swearing prior to trial he had just before accepted—by responding to its last question: "I am confused about that"—the judge both added to and distorted the evidence as well as assumed the role of a witness by telling the jury: "It was a word [truthful] he didn't understand". The court of appeals excused what in its own decision it had described as error by holding that there was no violation of the first and second *Quercia* proscriptions and, instead, considered error during trial as if involving only the third.

It would appear that the court of appeals believed that the trial judge's "comments" in "addressing witness credibility" had not been "one-sided" because his testimony regarding what witnesses "usually" do could be said to have been applicable to all those whose testimony the jury considered. They were not, however, impartial—it was petitioner which made accusation of perjury, as the trial judge remarked; and plaintiff who claimed in summation that he ". . . can't say" petitioner's fact witnesses "didn't believe the things they told you" because it had been necessary for them to "reconstruct" their testimony based upon "documents with numerous errors, dates, events, absent records" (A.1349). Since what the judge said was not merely invidious it *answered* petitioner's summation claim that plaintiff's alleged shipboard knee injury never occurred, the district court surely did not "strive for

'that atmosphere of perfect impartiality which is so much to be desired in a judicial proceeding' ". *Santa Maria v. Metro-North Commuter R.R.*, 81 F.3d 265, 273 (2nd Cir. 1996), quoting *Glasser v. United States*, 315 U.S. 60, 82 (1942). Just as surely, the trial judge improperly ". . . convey[ed] the court's view about the merits of a party's claim" because his one-sided questions established that plaintiff's affidavit was only mistaken and, hence, that it did not impeach his trial testimony which therefore had to be true. *Berkovich v. Hicks*, 922 F.2d 1018, 1025 (2nd Cir. 1991). The trial judge also "impos[ed] his own opinions on the jury" and to affirm the court of appeals also had to contradict its holding in *Care Travel Co., Ltd. v. Pan Am World Airways, Inc.*, 944 F.2d 983, 992 (2nd Cir. 1991). Moreover, in *Rivas v. Brattesani and Romano*, Second Circuit No. 1745, September 4, 1996, a denial of a new trial was reversed for comments out of the hearing of the jury and questioning of witnesses far less extreme and intrusive than those of the trial judge in this case, by holding, based upon *Montgomery Ward & Co. v. Duncan*, *supra*, that ". . . of course the rule [is] that a motion for a new trial must be granted if the trial was not fair to the moving party". In *Starr v. United States*, 153 U.S. 614, 626 (1894) and *Hickory v. United States*, 160 U.S. 408, 421-23 (1896), this Court held that the "lightest word or intimation" given by a trial judge to the jury "may prove controlling", decisions which the court of appeals ignored although what was "intimated" was not less than that petitioner's claim of perjury—including perjury occurring prior to trial which plaintiff falsely admitted—should not be believed. The remark out of the jury's hearing that claiming perjury would have the result of "enhancing the damages that you are going to pay" demonstrates harm from error in the opinion of the person with " 'feel' for the overall case" (*Neely v. Eby Const. Co.*, 386 U.S. 317, 325 (1967)) on the basis of cause (telling the jury that they should not believe plaintiff had lied and resulting nullification of the immediately ensuing "*falsus in uno, falsus in omnium*" charge (A.1432)) and effect (the verdict for

$672,000 damages for pain and suffering although plaintiff's doctor's records showed he was pain free after knee replacement surgery, which in any event would have occurred later, on November 15, 1993, only 41 days after it was performed (A.1626)). Holding the judge's "comments" not prejudicial despite his prediction which he later assured would prove accurate contradicted *San Antonio v. Timko*, 368 F.2d 983 (2nd Cir. 1966), a case in which it was said that an error which can be excused when a case is clear requires reversal when it is close. In *United States v. Filani*, *supra*, 74 F.3d at 386, it was held that a "searching examination of the entire trial transcript" is required before it can be said that a judge's biased questions did not have harmful impact; and in this case the judge repeatedly expressed prejudice against petitioner's defense of plaintiff's perjury both in and out of the jury's hearing. And as this case shows, a holding that parties are "entitled only to a fair trial, not a perfect trial" is as meaningless as the claim that a district court in the Second Circuit has discretion to grant a new trial on evidentiary grounds in any case where weight and credibility are inseparable—what was found only "less than desirable" was the trial judge's "comments" telling the jury to ignore petitioner's argument why plaintiff's claim of injury January 17, 1991 might represent fraud upon the court.

REASONS FOR GRANTING CERTIORARI

Excusing error during the trial represents a clearest instance where a United States Court of Appeals "so far departed from the accepted and usual course of judicial procedure, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power". Supreme Ct. Rule 10(a). The wilfulness of its far departure is shown by the Second Circuit's recognition of *United States v. Filani*, *supra*, and its refusal to follow its own reading of this Court's binding precedent. Its extent is demonstrated by the fact that it

affirmed in an unpublished opinion which—had the trial judge's "comments" been described—would have been obvious error. For reason of concern for the reputation of the courts, whether a judge can tell a jury what witnesses "usually" do or that they don't "understand" what "truthful" means is "an important federal question" which was decided "in a way which conflicts with relevant decisions of this Court". Rule 10(c). Even an absurdly unfair trial is, however, less important than the recently adopted "law" of the courts of appeals.

Liability claims are often proven only through testimony and in most cases weight of evidence cannot be evaluated without considering witness truthfulness; and when some level of self-impeachment is reached, because no witness is competent to testify unless he or she knows what "truthful" means, evidence essential to the verdict must be found to be false. No less than judicial "comments" concerning what witnesses "usually" do, decisions denying the right of a trial judge to reject a jury verdict by disagreeing with its evaluation of witness credibility decrease confidence in the jury trial system; and judicial response no matter how earnestly believed, asserting, as did the district court, or assuming, as the court of appeals may, that "lying . . . usually that doesn't happen" will not alter that fact. There is no doubt that there is conflict between circuits concerning a trial judge's right to find with reason that evidence supporting the verdict is perjury, not worthy of belief or implausible and thereafter weigh only whatever evidence remains. Rule 10(a). See, *Swentek v. USAIR, Inc., supra,* (judge may grant new trial based upon his or her own belief of witness credibility); *White v. Pence, supra* (case remanded for reconsideration with instruction that the district court can reject testimony the jury believed), holdings which cannot be reconciled with *Sorlucco v. New York City Police Department, supra,* (no disagreement with jury credibility assessment permitted) or *Latino v. Kaizer, supra* (disagreement allowed only when evidence supporting the

verdict is physically impossible). Before this Court's very recent decision in *Gasparini, supra*, it would not seem that it had said more than that whether to grant or deny a new trial motion addressed to the evidence was "confided almost entirely to the exercise of discretion on the part of the trial court" (*Allied Chemical Corp. v. Daiflon, Inc., supra*, 449 U.S. 33, 36 (1980)); and this holding—which *is* sufficient if all a trial judge should ever do is consider the facts and consult his or her conscience—alone establishes that the Second Circuit rule forbidding re-examination of a jury's credibility findings is error. There is no doubt that it is a new trial *grant* which bar to review is designed to shelter because it is this determination, and not a denial, which protects the reputation of the jury trial system—the power to order a case retried has the effect of verifying not only decisions refusing to but all those verdicts which are not as a result rejected. Nonetheless, so far has zeal proceeded to avoid retrials in personal rights or injury cases—those that are not "complex" but are "highly disputed" in part because even badly impeached or inherently implausible testimony can establish that there "*is* no great weight of evidence in any direction"—that the federal courts appear to be abandoning defense of the truth where it is most needed; and the district court went so far in this case as to insist that a party should too. In fact, to conclude that the Second Circuit's view of abuse of discretion is reconcilable with Rule 59(a) F.R.Civ.P. because it leaves a district court judge the same "large" discretion English common law trial courts had (see, *Aetna Cas. & Surety Co. v. Yeatts, supra*) requires as much an act of imagination as the trial judge's belief in what witnesses "usually" do.

The view of the courts of appeals that they have power to review not only "conflicts with relevant decisions of this Court" the reason it does demonstrates why this Court's intervention is required. To treat a reviewable mistake of law concerning the *extent* of a trial judge's discretion or authority as opportunity to reconsider the *soundness* in particular cases of

an exercise "confined almost entirely to the . . . discretion of the trial judge" is not error it is paradox which can be remedied only by a decision of this Court setting out what that discretion is and whether it includes the right to reject testimony or other evidence believed reasonably to be perjury, unworthy of belief or implausible, issues concerning which the courts of appeals are in any event hopelessly in conflict. They have on their own created a right to review and many use that power to bar exercise of the trial judge's discretion or to curtail it; and as a result not "a" but every "United States Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court". Sup. Ct. Rule 10(c).

CONCLUSION

The writ should be granted.

Respectfully submitted,

JOSEPH T. STEARNS (S-3814)
KENNY & STEARNS, of Counsel
Attorneys for
Energy Transportation Corp.
26 Broadway
New York, New York 10004
(212) 422-6111

Dated: New York, New York
October 16, 1996

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 95-7969
Filed June 25, 1996

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the ___ day of _____, one thousand nine hundred and ninety-six.

PRESENT:

Hon. James L. Oakes,
Hon. Frank X. Altimari,
Hon. John M. Walker, Jr.,
Circuit Judges.

JIMMIE GARNER and CONNIE GARNER,

Plaintiffs-Appellees,

—v.—

ENERGY TRANSPORTATION CORPORATION,

Defendant-Appellant.

APPEARING FOR APPELLANT: JOSEPH T. STEARNS
NEW YORK, NEW YORK

APPEARING FOR APPELLEES: PAUL T. HOFMANN
NEW YORK, NEW YORK

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York (Knapp, *Judge*), and was argued.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of said district court be and it hereby is AFFIRMED.

Defendant-appellant Energy Transportation Corporation appeals from a judgment of the district court denying the defendant's motion for a new trial pursuant to Fed. R. Civ. P. 59. This is a seaman's personal injury action brought pursuant to the Jones Act, 46 U.S.C. § 688, and general maritime law alleging liability for negligence and unseaworthiness. Following a nine-day jury trial, the ten-member jury awarded the plaintiff damages in the amount of $1.1 million in connection with two slip-and-fall incidents which occurred while he was employed aboard the defendant's ship. The $1.1 million

award comprised $672,000 for pain and suffering, $128,000 for past pecuniary loss, and $60,000 per year for five years for future pecuniary loss.

The defendant primarily argues that a new trial is required on the ground that the district judge "testified" in connection with the defendant's cross-examination of the plaintiff and during the court's charge addressing witness credibility. Although this trial may not have been error free, the defendant is entitled only to a fair trial, not a perfect trial. It is well established that a judge may ask questions of a witness that may aid the understanding of the jury. *Johnson v. Celotex Corp.*, 899 F.2d 1281, 1290 (2d Cir.), *cert. denied*, 498 U.S. 290 (1990). Moreover, the district court did not "step across the line and become an advocate for one side." *United States v. Filani*, 74 F.3d 378, 385 (2d Cir. 1996). We find that the judge's comments, while less than desirable, did not compromise the fairness of the trial to the defendant.

The defendant also argues that the jury's verdict cannot be sustained because it failed to apportion damages between the plaintiff's two on-board injuries. The defendant, however, failed to object to the portion of the charge instructing the jury that it need not do so if it found no contributory negligence on the part of the plaintiff. The jury found no contributory negligence by the plaintiff. Moreover, although it is possible that the jury impermissibly awarded additional damages for lost wages solely on account of the plaintiff's elbow injury, we decline to disturb the award since there is a rational basis for concluding that the jury made a proper award based on the jury's answers to the remaining interrogatories.

Finally, the defendant contends that the jury verdict should be reduced on the ground that it was excessive. Because we find that it is not so excessive that it shocks the conscience of the court, we uphold the verdict. *See Scala v. Moore McCormack Lines, Inc.*, 985 F.2d 680, 683 (2d Cir. 1993). We have considered the defendant's remaining contentions and find them to be without merit.

For the reasons set forth above, the judgment of the district court is hereby AFFIRMED.

HON. JAMES L. OAKES
Hon. James L. Oakes, U.S.C.J.

HON. FRANK X. ALTIMARI
Hon. Frank X. Altimari, U.S.C.J.

HON. JOHN M. WALKER, JR.
Hon. John M. Walker, Jr., U.S.C.J.

ENDORSEMENT

Jimmie and Connie Garner v. Energy Transportation Corporation 92 Civ. 8660(WK)

WHITMAN KNAPP, SENIOR D.J.

For the reasons stated on the record on September 8, 1995, defendant's annexed motion for a new trial is denied.

SO ORDERED.

DATED: September 8, 1995
New York, New York

/s/ WHITMAN KNAPP
WHITMAN KNAPP, SENIOR U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 92 Civ. 8660

September 8, 1995 11 a.m.

JIMMIE GARNER and CONNIE GARNER,

Plaintiffs,

—v.—

ENERGY TRANSPORTATION CORPORATION,

Defendant.

Before:

HON. WHITMAN KNAPP,

District Judge.

APPEARANCES

CAPPRELLO, HOFMANN & KATZ
Attorney for Plaintiffs

BY: PAUL T. HOFMANN

KENNY & STEARNS
Attorney for Defendant

BY: JOSEPH T. STEARNS

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[2] (Case called)

MR. STEARNS: Good morning, your Honor. As you know, my name is Joseph Stearns representing Energy Transportation Corporation, the movant seeking a new trial pursuant to Rule 59 of FRCP. Multiple grounds are alleged, as the court is aware, including the fact that the verdict in plaintiffs' favor was against the great weight of credible evidence.

THE COURT: Don't argue that point.

MR. STEARNS: And, in addition, the court, among other things, telling the jury that lying was not his experience—

THE COURT: I put that in every charge I have given since I have been on the bench and so far I haven't been reversed on that ground and I don't think it will be this time.

MR. STEARNS: I had that thought very recently because it explains certain things about the way the case was presented. In any event, a deliberate intention to deceive by a witness is a credibility issue. If the court tells the jury that in its experience that is not usually done, the court has testified.

THE COURT: And you didn't object at the trial of course.

MR. STEARNS: Sir, I did object at the trial.

[3] THE COURT: What did you say?

MR. STEARNS: I said I was very concerned and I thought it was wrong that you had made this remark regarding credibility.

THE COURT: Where is that?

MR. STEARNS: It's—

THE COURT: Show it to me.

MR. STEARNS: I do not have the transcript. I will find it for you and send up copies with a letter.

THE COURT: I don't think you need to show it to me because I think I am right on your objection but you made your point.

MR. STEARNS: If I might because of the importance to my client and the people they employed—

THE COURT: I happen to think my charge was correct and I also recollect you didn't object to it but if I am wrong on that—

MR. STEARNS: You are quite right in your recollection that at the time it was given I did not. However, after the jury retired—

THE COURT: After the jury.

MR. STEARNS: —and before their verdict that objection was made.

THE COURT: I see.

MR. STEARNS: In any event, there is one other [4] thing that I should mention. As Mr. Hofmann pointed out in his papers, page 18 in which he quotes the charge or the preface to the charge in which you advise the jury of your experience regarding witness' deliberate intention to deceive, it's pointed out—that is, the text points out—that immediately after making that remark the court gave the falsus in uno charge telling the jury not that they were free to disregard all the witness' testimony but they should take very seriously—

THE COURT: I think I told them they could disregard all of it.

MR. STEARNS: That is the point I want to make. The juxtaposition of the preface of the charge regarding the court's belief as to what witnesses usually do in its experience and falsus in uno. Now, falsus in uno, of course, refers to false testimony which is testimony that is offered which deliberately intends to deceive and if you tell the jury that witnesses

don't usually do that, then, of course, the falsus in uno charge is an irrelevancy. It's completely undercut.

What I am trying to do is complete my argument made in the papers about the importance, the fundamental nature of the error in telling the jury the court's personal opinion about what witnesses in its experience usually do. Because it is law, and probably it has been charged in every **[5]** civil case in this court for likely 200 years, that the jury should be instructed that they are free to disregard testimony in its entirety if they believe in one aspect it is false.

Now, as the court is aware, the defense of the defendant in this case was that Mr. Garner and his wife had testified with deliberate intention to deceive. If you tell the jury based on the court's experience that this does not usually happen and then you mention falsus in uno, there is a contradiction because you are telling them that the predicate, i.e., false testimony in a single respect of falsus in uno permitting the jury to reject all testimony of a witness—

THE COURT: When did you first object to this?

MR. STEARNS: I am telling you that. I will go further. It's not even in my papers.

THE COURT: What?

MR. STEARNS: I am saying that what I am saying now is not even in my papers. That is how embarrassed I am and I am completing my record by telling you this because it frames, as well perhaps as anything, the issue. What I am saying is if you tell the jury that witnesses do not usually lie and then give them a falsus in uno charge the falsus in uno charge is meaningless because you have told them that the predicate of that charge that a witness deliberately **[6]** testified with intention to deceive doesn't happen.

THE COURT: You never mentioned that during the trial.

MR. STEARNS: I did not, sir.

THE COURT: Okay.

MR. STEARNS: I did not. Connections between one thing and another thing sometimes escape ordinary lawyers like myself. However, it's important I bring it to your attention.

In addition, as has been pointed out in the papers, Jimmie Garner in the course of cross examination admitted that he perjured himself in that affidavit. He said that the affidavit was not only inaccurate, he also said it was untruthful.

THE COURT: That is not necessarily perjury unless he knew it was untruthful at the time he said it.

MR. STEARNS: This was simply inappropriate because there is no question that the nature of claim for damages in this case changed between the filing of the complaint on October 16, 1992 and the trial of the case early this year. The affidavit and the complaint make plain that when the suit was instituted Mr. Garner was claiming that his "employer" was negligent in allowing him to remain aboard ship after January 13, 1990. The accident report includes the description of his knee injury which occurred [7] either the 17th or 18th of January, 4 days later, was in part caused by the condition of his knee in addition to the fact that there was wind on deck.

Now, that makes perfectly plain the fact that, as is alleged in the complaint, the original case was one for aggravation of a preexisting condition, which is what the complaint after all says, and the theory of the case was based on liability for failure to treat in allowing Mr. Garner to remain aboard ship with his knee in the condition it was as a result of his fall at home. Now, that is necessarily so because of the statement in his affidavit. "I should not have been allowed to remain aboard ship after January 13" speaks of a date which is 4 days after (sic) the ship reported the accident. Unfortunately, as I pointed out, there is motive and was in this case for changing the basis for the claim of damages.

Plaintiff has three-compartment osteoarthritis in his knee in September 1989. After the complaint, and of course before trial, his treating doctor, Danny Sparks in Gadsden, Alabama, the surgeon who operated on his knee and put in a prosthesis,

testified it would be very difficult and complicated for him to make any assessment or apportionment of cause of the need for surgery to an accident aboard a ship if, as the doctor said, the condition of his knee is the result of a fall at home occurring just [8] before he shipped out had been the source of ongoing symptoms.

The case would have been as originally pleaded and identified in Mr. Garner's October 14, 1992 affidavit, which he gave to his attorney in Alabama, for reaggravation of a condition long-standing as of 1989 as a result both of an accident falling off the porch at home on December 28, 1990 and in addition to that some contribution from a shipboard fall.

In addition, the claim of failure to treat, given the testimony at trial considered in its entirety, would not have been very likely well received by the jury because the claim was, and it's expressed in the affidavit, they should have sent me home after arrival at the first port in Indonesia on January 13, 1991; that Captain Smith was negligent in allowing him to be signed on the ship.

Now, given the captain's testimony, to some extent corroborated by Mr. Garner, that it was Garner's wish not to be sent home or to a doctor for examination when he arrived aboard the ship in Japan, the jury would have been presented with a case where based on the claim the substance would have been the captain should have saved Garner from his own folly and should have anticipated if he was out on deck in windy conditions because of the deteriorated and injured condition of his knee he might be caused to fall and [9] sustain further injury.

There is no question that that is the complaint allegation and that the affidavit adopts that view of liability for (sic) no other way. So we have a situation where there would have been an indeed frail claim of liability if it were acknowledged, as Mr. Garner did after all acknowledged to his physiotherapist, Mr. Bishop, that the injury at home in December 1990 had been the source of ongoing problems.

What happened was the two distinguished gentlemen who testified in this case for defendant, the captain and the chief mate, permitted a man to be signed on the ship who should not have been and he was permitted to do that because the master knew that to send him to a doctor and if that doctor found that Mr. Garner was unfit for duty he would have lost his job. Shipping conditions for people in the American Merchant Marine are not good. To be a bosun, part of the steady rotation aboard these ships basically entitled to six or more months of employment at very high wages compared to world scale is a very, very vitally important career position to a man like Mr. Garner who has a younger wife and quite young children.

That was presented to Captain Smith and, as he testified, Mr. Garner pleaded with him not to be sent to a doctor, although Mr. Garner's arrival in Japan after an **[10]** accident at home occurring between the time he had his presign-on physical examination by his union and showing up at shipboard having on his own without regard to what he was required to do taken it upon himself to present himself in this distress situation to the captain hoping, and he was successful, that the captain would extend to him the compassion that he admitted the captain had showed him in conversations with Dr. Sparks, as Dr. Spark's records reflect, was something that would have gotten him fired, would have put him to the expense of paying his own way home, and likely the expense of flying a substitute bosun out to the ship in Japan to relieve him.

The captain signed him on. The man was examined as he admitted. Ultimately on January 6, 1991 he was found to have a very badly sprained and swollen knee.

THE COURT: You are telling me a lot of things you have heard about but what are you arguing here?

MR. STEARNS: I am arguing the circumstances of the case and how—

THE COURT: Are you arguing sufficiency of evidence?

MR. STEARNS: No.

THE COURT: What are you arguing?

MR. STEARNS: What I am arguing is the vital fundamental importance of the issue of deliberate intention [11] to deceive.

THE COURT: All right. I will hear no further on that. Go on to your next point.

MR. STEARNS: Should I revisit the introduction to the charge?

THE COURT: Don't revisit anything.

MR. STEARNS: I have cited the Supreme Court case, which is on all fours and the Second Circuit case involving American Export Lines.

The other issues involve interruption of cross examination both on Mr. Garner's deposition testimony and on his affidavit and the court's ruling that Mr. Garner did not understand what the word truthful meant.

THE COURT: You argued that before.

MR. STEARNS: Okay.

The other issues have to do first with the excessiveness of the verdict.

THE COURT: Don't argue that.

* * *

[14] THE COURT: Well, I have listened to you very carefully but nothing you say has persuaded me, and I don't suppose you want to change my view.

MR. HOFMANN: No, Judge.

THE COURT: Motion denied.

Thank you.

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 92 Civ. 8660(WK)

April 18, 1995

JIMMIE GARNER and CONNIE GARNER,

Plaintiff,

—against—

ENERGY TRANSPORTATION CORPORATION,

Defendant.

ORDER OF JUDGMENT

THIS MATTER HAVING BEEN heard before the Honorable Whitman Knapp, and having been tried to a jury by plaintiff, through his counsel, Cappiello Hofmann & Katz and defendant, by its counsel, Kenny & Stearns, and said jury having commenced on March 13, 1995, and a verdict having thereafter been rendered in favor of plaintiff on March 24th, 1995 in the following amounts:

For past pecuniary losses: $128,000

For future pecuniary losses: 5 years at $60,000/year

For past and future pain and suffering: $672,000

AND THE PARTIES HAVING AGREED to permit the Court to determine the present value of the future damages and the prejudgment interest awardable;

AND THE COURT, having performed the calculation on the present value of the future damages, finds—without objection of either party—such value to be $282,810.

AND THE COURT further finds—over defendant's objection—that plaintiff is entitled to $7584.40 in prejudgment interest.

AND FURTHER, the plaintiffs having voluntarily discontinued the action on behalf of CONNIE GARNER, her claims, as stated in COUNT IV of the complaint, are hereby dismissed.

THEREFORE, IT IS ON THIS 13TH DAY OF APRIL, 1995 ORDERED, ADJUDGED AND DECREED, that judgment, retroactive to March 24, 1995, is to be entered in favor of plaintiff, JIMMIE GARNER, against defendant, ENERGY TRANSPORTATION CORPORATION, in the amount of $1,090,394.40, plus costs of the litigation to be assessed by the clerk of the court.

SO ORDERED.

New York, New York
April 13, 1994

/s/ WHITMAN KNAPP
WHITMAN KNAPP, SENIOR U.S.D.J.

9/22/95 Bill of costs as taxes in the sum of $3697.65 Plaintiff as against Defendant

#95, 0790

/s/ JAMES M. PARKISON
CLERK

By: RONALD A. CHURCH
DEPUTY CLERK

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 95-7969
Filed August 27, 1996

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 27 day of August, one thousand nine hundred and ninety-six.

GARNER

Plaintiffs-Appellees

—v.—

ENERGY TRANSPORTATION

Defendant-Appellant

A petition for rehearing containing a suggestion that the action be *reheard* in banc having been filed herein by the appellant July 9, 1996.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

GEORGE LANGE III, Clerk

By: BETH J. MEADOR
Beth J. Meador,
Administrative Attorney

AFFIDAVIT

My name is Jimmie Garner of 3965 Hood Drive, Gadsden, Alabama 35903 (442-8329) I have personal knowledge of the following facts:

I have been in the Merchant Marines since 1963. Since 1984, I have worked for Energy Transportation Corp. At the present time, I am Boatswain, or a supervisor, of maintenance and repairs on the LGN Aquarius. I have 9 men under me.

On 1/18/91, I was working on the bow of the ship and a strong wind was blowing dead ahead (35-40 knots).

* * *

The wind was blowing very strong. I fell on the slippery deck. When I fell, I hurt my left knee and thought I broke it.

* * *

I previously injured my left knee when I was home on leave. The accident occurred when my wife and I were taking a box out of the house. I stepped off a step and twisted my knee. I was not treated by a doctor.

I reported to work on 1/4/91 in Japan. On 1/6/91, I mentioned to the chief mate that I had injured my knee at home and my knee was swollen. He gave me Ibuprofen 800 mg., one tablet three times a day. He placed on his report 'light duty, stay off knee as much as possible.' I was not informed that I was on light duty. I was given an ace bandage.

On 1/13/91, we were at port in Indonesia. I did not know I was on light duty and I was not instructed to obtain medical treatment. If I was classified as stated, I should have received medical treatment.

* * *

I believe my employer was negligent in allowing the slick deck to exist, in allowing me to stay on the ship after 1/13/91, and in assigning me duties on 3/13/91.

I have lost wages and do not believe I will be able to work to age 65 as I had planned.

/s/ JIMMIE W. GARNER
JIMMIE GARNER

OCTOBER 14, 1992
DATE

Sworn to and subscribed to
before me this 14th day
of Oct, 1992.

/s/ MYRON ALLENSTEIN
NOTARY PUBLIC

Direct Examination of Plaintiff Jimmie Garner

[199] Q. At—during this period from March until July, did you have a discussion with Dr. Sparks concerning further care he wanted to do on your elbow?

A. Yes.

Q. What was conveyed to you?

A. Along the very latter part of my physical therapy [200] that bone in there had slipped in therapy, and along summer, the latter part of it, he recommended that I needed to have a pin put in there and I told him, I says, look, I'm getting ready to go back to sea, I've got to go back to work.

Q. Did he give you any other options with respect to this problem that you just described?

A. He said it was nothing serious at the time, that later on in life I may end up having to have some attention brought to that but right now it was not necessary, that he would just make mention that I needed a pin.

Q. What did you choose to do?

A. I choose to go ahead and go back to sea.

* * *

Cross Examination of Plaintiff Jimmie Garner

[384] Q. Now, did you say the second paragraph of your affidavit of October 14th, 1992, that you mentioned to the chief made—and I will read it word for word—on 1/6/91, I mentioned to the chief mate that I had injured my knee at home, and my knee was swollen."

Q. Now, was that statement which you made in October 1992 under oath accurate?

A. No, sir.

Q. Was it truthful?

A. No, sir.

[385] THE COURT: What do you mean by, "No, sir"?

THE WITNESS: There is an explanation of that.

THE COURT: "Truthful" means that you knew it was not true when you wrote. It that what you intended to say?

THE WITNESS: No, sir.

THE COURT: It was mistaken?

THE WITNESS: It was mistaken.

THE COURT: So you did not realize what truthful meant when you answered that question?

THE WITNESS: I am confused about that.

THE COURT: That's the end. No more discussion.

THE WITNESS: Okay.

* * *

[387] THE COURT: Received.

(Defendant's Exhibit YY for identification [Plaintiff's October 14, 1992 affidavit] received in evidence)

MR. STEARNS: Your Honor, with your permission, may I read that paragraph?

THE COURT: Certainly.

Incidentally, understand that when I interrupt to question the witness, there is no importance to that, and I have no views one way or the other. It was a word he didn't understand.

[388] Q. When I have just red these excerpts from the affidavit are in certain material respects, you now claim, inaccurate, is that right?

A. That is correct.

Q. You said you were given access to your entire file concerning the events in January and March, 1991, by Lionel Senas, the master of the Leo, when you returned to the ship about a year later, right?

A. The first time I—

[389] Q. The return to the ship was not a year later, but you said that you were given your complete file by Captain Senas about a year after you left the ship on March 13, 1991, is that right?

A. When I was leaving, he gave it to me.

* * *

[394] MR. STEARNS: May I have a sidebar conference?

THE COURT: Yes, you may.

(In the robing room)

THE COURT: The purpose of cross-examination is to get facts, not to sum up.

MR. STEARNS: I am not summing up.

THE COURT: Yes, you are.

MR. STEARNS: I am entitled, am I not—

THE COURT: You are not entitled to sum up or argue with the witness. You are entitled to get facts.

MR. STEARNS: I am not arguing with the witness.

THE COURT: You are. You keep on saying, "Wasn't it so, wasn't it so, and still you did it." That is summation.

MR. STEARNS: Am I entitled, through the witness's testimony—

[395] THE COURT: What?

MR. STEARNS: Am I entitled, through the witness's testimony, to point up inconsistencies?

THE COURT: No. You are entitled to point up inconsistencies by getting them on the record, and then you argue to the jury. You do not argue with the witness. We do not have a concurrent summation. Among other things, it is crucifying your case. You are always saying alleged, claimed, action, always telling the jury you think he committed perjury. The jury doesn't think he committed perjury.

MR. STEARNS: How do you know that?

THE COURT: Because I can observe them and observe their reactions. I don't think anybody thinks he has committed perjury. I think the facts are entirely different from what he testified to, but that is not perjury.

MR. STEARNS: That because he is exempt—

THE COURT: Because he is a human being.

MR. STEARNS: He is fallible.

THE COURT: Not only is he fallible, but every human being who ever lived keeps on reconsidering things and changing their views of what happens, and a lawyer accuses him of perjury and the jury knows damn well it is not perjury. All you are doing is evoking sympathy for him by **[396]** asking him silly questions. He said it happened on the 13th and it happened on the 14th, and you are trying to make a liar out of him because it was the 13th and not the 14th.

MR. STEARNS: I don't know quite what to say.

THE COURT: Well, anyway, that is my ruling. But the purpose of cross-examination is to ask questions, not to argue with the witness.

THE COURT [sic. Mr. Stearns]: I am pointing up inconsistencies. [The Court] You are not. You are arguing with the witness. Stop it.

You have an exception to my ruling.

I told you, you shouldn't accuse your opponent of suborning perjury, and you shouldn't continually accuse him of perjury by your questions: You allege, you claim.

MR. STEARNS: Let me just say, I am entitled to my view. This man is committing perjury.

THE COURT: I do not agree with you and I don't think the jury does, and by continually accusing him of it, you are enhancing the damages that you are going to pay.

* * *

[The Trial Judges "Comments" Addressing Witness Credibility]

[1178] That's the end of Bob Hope. We will get down to business.

In the first place, I will ask the clerk to circulate among you a copy of the verdict sheet that you are going to have to answer at the end, and I will refer to it from time to time.

You might as well read it to yourselves and I will refer to it. (Pause).

THE COURT: That gives you a general idea of what you are going to be up to. I will refer to it as we go along.

In the first place, let me remind you what I said way at the beginning with respect to the division of functions between you and me. You are supreme on the facts, and I have to deal with the law. What I think of the facts or don't think of the facts is wholly immaterial, and I don't intend to give you any impression of what I think of the facts are. Don't read into the order I say things or the way I say things any impression I may have. Because, as I told you, my theory of how the jury system works is that each of us does our own job and doesn't pay any attention to how the other one is doing his or her job.

Now, the first responsibility is finding out the facts. Your responsibility is findings out the facts. The **[1179]** first thing you want to do is judge the credibility of the witnesses. I don't happen to like the use of the word "credibility," because but I can't think of any other word, so I have to use it.

The reason I don't like it is it suggests if a witness is not credible, he is lying, or she, and I have no way of knowing whether that happened in this case. Lying is sitting on the witness stand and saying something that the witness knows not to be true at the time he or she is saying it. Now, I don't have any idea whether that happened in this case or it didn't. That is something for you to judge. It just has been my experience that, usually, that doesn't happen. Usually, the witness has convinced him or herself what he or she is saying by the time

they get on the witness stand, and that is to about the extent of it. That may be wrong, they may misremember things. That is for you to determine. But I will come back to that again shortly.

How do you judge the credibility? You judge credibility the way you do in your daily lives. You are always called upon to judge credibility of the people you are dealing with, that is, judge the extent that you want to rely on what they say. Do they know what they are talking about? Have they any intention to deceive you or any interest in deceiving you? When I say intent, that implies lying, and that is usually not what I think happens. Do **[1180]** they have any interest in deceiving you? Do they seem to know what they are talking about, and so on?

* * *

That is what you do here in the formal atmosphere of the courtroom. You have direct and cross-examination. Does the witness seem to you to be acting more or less alike on direct and cross-examination? Or when it comes to cross-examination, does he seem, he or she seem to adopt a different attitude, suggesting that he may have consciously or subconsciously be trying to deceive you. Or on cross-examination, does he or she seem to be trying to answer questions, not trying to convey impressions? That is something for you to consider.

Obviously, to what extent does the witness have an interest in the outcome? Well, in this case just about everybody who testified had an interest in the outcome, or could be presumed or found by you to have an interest in the outcome. Certainly, the plaintiff and his wife have an obvious interest. They want to you have give them money, when they get it, they will spend it. I can't think of a better interest in the outcome. Presumably you may find the defendants—none of the defendants have, as far as we know, any pecuniary interest personal to them, but people have interests in defending people they work for and their reputation with the people they work for. All those things are for you to weigh.

* * *

INJURY REPORT

[ENERGY (LE-687-INJ)]

Name JIMMIE W. GARNER Rating Boatswain

Address Rt #1, Box 517 Gadsen, Alabama 35901

Date of Injury 12/27/90 Time __-__ Port At Home

Date Reported 1/6/91 Time 1500

Reported to Whom (Name/Rank) A. F. BARNES, Chief Mate

Report prepared by A. F. BARNES Rating Chief Mate

Nature of Injury Sprain, swelling of left knee.

Injury Investigated by A. F. BARNES, Chief Mate

Name of Person in Charge of Work A. F. BARNES, Chief Mate

Medical Treatment by Vessel if any Ibuprofen, pain/anti-inflammatory 800 mg tablets, one tablet 3 times a day for pain and swelling. Ace bandage wrap for knee.

Describe in detail area of injury, equipment involved and condition of both Bos'n GARNER had been working on the bow and in forward stores (BB court) the morning of 18 January 1991. At the time of his fall at about 0930 on 18 January 1991, a strong relative wind was blowing from ahead of about 35 to 40 knots. The force of this wind is increased in the vicinity of No. 1 Tank cover.

Injured's statement of how injury occurred I initially sprained my knee when I stepped off my porch at home and twisted my leg. The injury to my knee was aggravated when the wind caught me when I was proceeding aft on the main deck port side at No. 1 tank at about 0930 on 18 January 1991, and I

fell down on the deck again twisting my leg.

Dated 9 January 1991 [sic]

Injured's Signature JIMMIE W. GARNER

MEDICAL LOG

LNG LEO Voy 238 From 5 January 1991 To 22 January 1991

1	2	3	4		5		6	7	8	9	10
No.	Date	Name and Rating	Acc.	Ill.	1st Rep Visit		Give Brief Description of Injury or Illness Treated, and Apparent Cause	Treatment	Disp	Rep	Signatures
1	1/5 6	None Jimmie W. GARNER, Bos'n.	X		X		Swollen, sprain to left knee. Reported time 1500.	Ibuprofen 800 mg tablets, one tablet 3 times a day. Light duties, stay off knee as much as possible.	1	✔	/s/ JIMMIE W. GARNER

[LETTERHEAD OF GADSDEN PHYSICAL THERAPY CLINIC]

Name: Jimmy Garner
Physician: Dr. Sparks
Dx: S-post arthroscope of the left knee for cartilage tear also s-post closed fracture of the left radial head
Date: 03/29/91

Prescription: Elbow rehab for ROM and strengthening also knee rehab

Frequency: 3 x a week

History and Subjective: Pt. is a 51 YOWM who states that he twisted his leg back on December of 1990, continued to have problems with it and had surgery last Saturday for torn cartilage. He also has a fracture of his left radial head that he had for two to three weeks when he fell at work and hit on his elbow. At this point, he has elected to go without surgery but will be reexamined by the physician in one week to make a further decision on this.

* * *

Thank you for this referral,

/s/ DAVID A. BISHOP P.T.
David Bishop, P.T.

EXCERPTS FROM RECORDS OF DANNY SPARKS, MD, PLAINTIFF'S TREATING PHYSICIAN

GARNER, JIMMY ACCT: 5063 3/29/91

Returns, follow-up (L) radial head fracture and arthroscopy, (L) knee. He is doing extremely well with his (L) knee. Excellent ROM. Good strength. He is walking unassisted now. Wounds are clean, healed and dry. We have removed sutures today. He has excellent ROM, which he has obtained all on his own, as far as his (L) elbow is concerned. Neurovascular status intact.

X-RAYS: Elbow films reveal that the fractured piece has migrated distally somewhat. This was always a questionable fracture. I think it might do better with an ORIF, since this is such a large piece, and has slipped some now.

He would like to give therapy a try, since he is doing so well. I think that is certainly acceptable. We will give him a week. Return at the end of that week.

DRS/jw

(2)

Supreme Court, U.S.
FILED
NOV 20 1996
CLERK

No. 96-665

In The

Supreme Court of the United States

October Term, 1996

ENERGY TRANSPORTATION CORPORATION,

Petitioner,

vs.

JIMMIE GARNER,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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Lutz Appellate Services, Inc.

30 pp

QUESTION PRESENTED

The proceeding below asserted claims for damages by a Jones Act seaman for injuries occurring in two separate, disabling accidents. Petitioner submitted evidence that it claimed impeached the evidence presented by Respondent. Petitioner's contentions were rejected by the jury. After the jury verdict, the district court considered, but denied, Petitioner's motion for a new trial, which the Court of Appeals for the Second Circuit affirmed. Essentially, the question presented by the petition here is:

Did Petitioner receive a fair trial?

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APPENDIX

Appendix A — Excerpted Jury Charge 1a

STATEMENT OF THE CASE

In the trial of this case below, Respondent, Jimmie Garner, presented claims for damages for personal injuries suffered on both January 17 and March 13, 1991. The injuries occurred in accidents that happened to him while he was working as a seaman aboard the vessel LNG LEO, a tankship owned and operated by Petitioner, Energy Transportation Corporation ("ETC").

At the time of trial, Respondent was 54 years old. He had only a Ninth grade education, and spent most of his life as a seaman.

In 1984, Mr. Garner was hired by ETC, which operated eight similar tank ships, including the LNG LEO, which carried liquified natural gas from ports in Indonesia to ports in Japan. (A314-317).[1] In April 1990, Mr. Garner was assigned to work as permanent bosun upon the LNG LEO. (A315). His first tour of duty lasted through August 1990, during which time he worked under the command of Captain Norman Smith. (A422).

Upon joining the ship, Mr. Garner observed that only the very forward part of the ship's main deck had upon it functional non-skid deck paint. (A324). Part of his assigned duties during the voyage included supervising the painting of much of the

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1. With limited exceptions, citations herein are either to the appendix annexed to the petition (designated as PA, etc.) or to the Joint Appendix and Supplemental Appendix submitted to the Second Circuit on the hearing of the appeal below (which bear the reference "A __" or "SA __"). The exceptions, as discussed in the text at footnote 2, *infra*, are to portions of the district court's charge which were omitted from the petition. Since the court's charge on witness credibility is central to the arguments made in support of the petition, and the omitted portions substantially negate Petitioner's complaints, the entire charge by the court concerning witness credibility is included in an appendix hereto, and is cited to as "RA __", *etc.*

rest of the main deck. In performing his duties, he discovered that the vessel had no abrasive additive for the deck paint, to give it a "non-skid" character. As a result, the paint was applied to the decks without abrasive additive. (A323-326, A421-424).

After Mr. Garner's first tour of duty ended in August 1990, the company scheduled him to return to the vessel around New Year's Day of 1991. In order to qualify to return to the job, Mr. Garner was required to undergo a pre-sign on physical exam which he successfully completed on December 23, 1990. (A495-496).

On December 27, 1990, Respondent had an accident at home where he mis-stepped from a porch and fell about one foot to the ground. In so doing, he slightly twisted his right knee. He suffered minor discomfort and swelling, which he felt were so insignificant that he sought no medical attention. (A342-344). His wife, Connie Garner, and his minister, the Reverend Billy Walker, both of whom observed him between the date of the incident on the porch and the date when he travelled to the ship, testified that by December 29, he had no noticeable disability, and did not complain of problems with his leg. (Connie Garner Test., A895-902; Rev. Billy Walker Test., A 787-789).

He reported for his next tour of duty on January 4, 1991. Upon boarding the ship, he reported to the captain who directed him to assist a technician doing work on equipment at the bow. After doing so, he returned to the captain's office to sign the shipping articles, at which time he mentioned to the captain that his knee had some swelling, probably caused by the fall off the porch, and aggravated somewhat when he ran through the airport to catch the plane he flew to reach the ship. The captain told Garner to report this to the Chief Mate, Alan Barnes (sometimes referred hereinafter as "the Mate"). That evening, while on the serving line to get dinner, Garner told Barnes about his slightly

swollen knee. Mr. Garner asked Barnes for something to treat it. Barnes agreed to provide some medication. (A347-51).

On January 6, 1991, Barnes approached Mr. Garner and apologized for having forgotten to give the medication previously promised. He told Mr. Garner that he had left some ibuprofen on Garner's desk. (A352). By January 8, Mr. Garner testified, the swelling had resolved. (A355). Mr. Garner, without difficulty, during the next nine days performed much heavy physical labor. This was corroborated through the testimony of a co-worker, Joseph Morrison. (Morrison Test. A717-720; Garner Test. A356-359).

On January 17, 1991, while the ship was sailing towards Japan, Mr. Garner fell on the wet, slick deck of the vessel, severely injuring his knee. The immediate, excruciating pain he felt was as if he "broke his leg off". (A364-368). His slip and fall was caused by a combination of the wind pushing him, the deck being slippery from water, and a fine residue of oil, and the deck not having upon it functional non-skid paint. (A369). At trial, these facts were corroborated by independent evidence. For instance, Mr. Morrison testified that the deck where Garner fell was devoid of functional non-skid paint. Additionally, in a statement by Mr. Morrison dated March 14, 1991, admitted into evidence, he wrote that the deck paint was inadequately infused with non-skid additive. (A722-723; A1729-30). As to the oil on the deck, Chief Mate Barnes confirmed that the Nos. 1 and 2 winches, and the two anchor windlasses on the foredeck, not far from the accident site, all were experiencing oil leakage problems. (A827). The deck worklog, furthermore, recorded that the deck in the area where Mr. Garner fell was thoroughly cleaned and degreased two days after the accident. (A381-83, 385-88; Deck Work Log for November 19, 1991, exhibit at trial, A1568).

Early on January 18, the day after the accident, Mr. Garner went to the Mate's office to discuss the incident. The Mate said to Garner "well you finally made the medical log", and then had Garner sign a blank accident report, which the Mate said he would later complete. The typewritten report was later filled in by Mr. Barnes. (A375-379). At trial Mr. Garner reviewed for the jury the completed accident report. He testified that the typewritten report had inaccuracies and changes from what he had told the Mate. (A379-381). Alan Barnes, in his testimony, conceded that he made numerous errors in completing the report. (A208-209).

Later on January 18, after examining Mr. Garner's knee, the captain asked Garner to bypass seeing a doctor in Japan, their next port, because that doctor would probably send Garner home as not fit for duty. The captain said he knew the doctor in the next Indonesian port, however, and he could get that doctor to treat Garner without declaring him disabled, which meant that Mr. Garner could remain working aboard ship. (A389-390).

By January 22, the voyage to Japan ended. As part of his duties, Mr. Barnes prepared the vessel's medical log. He followed his custom and practice of typing entries into the ship's medical log at the end of the voyage based upon hand-written notes he had made during the voyage. (A220, 393). On January 22, before arriving in port, the crew gathered in the mess room to handle necessary paper work. Those who had received medical attention during the voyage, including Mr. Garner, were asked to sign the medical log. Mr. Garner reviewed the log and saw that the only entry pertaining to him for the time period of this voyage was next to the date January 6, 1991. The information typed therein stated the date the Mate had given him medication, and the various treatments he recalled he had received since the accident. Mr. Garner signed the entry, concluding that it summarized his medical treatment and conditions for the past three weeks. (A393-397). Although Mr. Barnes testified that

the entry for January 6 reflected only Mr. Garner's condition on that date, he had no persuasive explanation for why there was no entry for January 17, the date of Mr. Garner's reported accident. (A211-212). Thus, the jury had ample evidence to conclude that Mr. Garner told the truth about his belief that, when he signed the medical log, he considered it to be a summary, or "consolidation", of the past treatment he received.

On January 28 the ship returned to Bontang, Indonesia, where the captain took Mr. Garner to see the doctor. The doctor diagnosed Mr. Garner with a torn knee ligament. (A397-401). The captain requested Mr. Garner to continue working despite the injury, and Mr. Garner agreed. (A389-390). At trial, the captain and mate denied overlooking his ailment so that Mr. Garner could remain at work. Neither, however, effectively explained how, without their intervention, Mr. Garner could be found fit for duty while having a torn ligament unless they had intervened on his behalf.

Mr. Garner suffered a second accident in the early morning hours of March 13, 1991 when the ship was at sea heading from Japan to Indonesia, passing through the Straits of Singapore. At approximately 2:00 a.m., while returning from some duties on the vessel's bow, Mr. Garner slipped and fell again on the ship's main deck. This time he struck and fractured his elbow. (A403-405; ex. 9, SA169). The lack of non-skid paint on the deck, and dampness, salt and grease thereon, all contributed to this fall. (A406-07). The ship's safety meeting minutes for March 31, 1991, reveal that a discussion was held in which it was mentioned that some of the decks needed non-skid paint. This corroborated Respondent's contention that the non-skid paint on the decks was poor. (SA188).

After Mr. Garner reported his March 13 injury to the Mate, he went to his room and spent the evening in pain. (A409-412). Later that morning the Mate had him sign another accident report

form, which was only partially filled out, and which later was completed with omissions and inaccuracies which Mr. Garner never had the opportunity to correct. (A412-413). Garner was taken to a doctor that morning and was made not fit for duty. (A421, 429-430). He was flown home in a torturous, three-day flight, in agony from his fractured elbow and severely injured knee.

Upon arriving at his home in Gadsden, Alabama, Mr. Garner saw Dr. Dan Sparks, the attending orthopedist at Holy Name of Jesus Hospital emergency room in Gadsden. Both the emergency room notes and Dr. Sparks' office notes state that Mr. Garner reported that he had had two shipboard falls about 6 weeks apart — in one he hurt his elbow and the other his knee. (Ex. 47, SA17; Dr. Sparks notes SA179). Even though one note from David Bishop, Mr. Garner's physical therapist indicates that the condition for which he treated Mr. Garner's knee was existent from December 1990 (which was when Mr. Garner admittedly did suffer a slight knee injury when falling from a porch), Mr. Bishop, in a different statement affirms that the accident reported to him occurred on the ship. Mr. Bishop's note states that Mr. Garner reported that "this injury per my interview with the pt. as he stated at that time back in March 29, 1991 occurred January 17, 1991." (A 1667). This, of course, is consistent with both the emergency room record from Holy Name of Jesus Hospital for March 17, 1991, and Dr. Sparks's office notes, for March 18, in each of which is recorded that Mr. Garner reported he fell on the ship six weeks earlier injuring his knee. (SA171; SA179).

Several days after seeing Dr. Sparks in the emergency room, Mr. Garner was admitted to the hospital for arthroscopic knee surgery. During surgery, Dr. Sparks found moderate three compartment knee arthritis, chondromalacia of the patella, a medial meniscus tear, blood in the joint, a hematoma associated with a medial collateral ligament tear and an absent anterior cruciate ligament. (A 1655).

After discharge from the hospital he underwent physical therapy for both his knee and elbow. He worked intensely, and by the beginning of July, had obtained about 70% strength and close to normal flexion and extension of the knee. His elbow, however, took longer to respond, and during the treatment, slippage of the bone fragment occurred. (A433-435, 446; SA20-26).

As of July 1, 1991 he was told that he could return to work, but both his knee and elbow still had some pain, swelling and limited motion. Mr. Garner rejoined the ship in August 1991, and worked through February 1992, except for a short break while the ship was in a shipyard. By December 1991, Mr. Garner's knee again became very symptomatic. He took to staying in his room for longer periods of time from where he supervised his men. This did not sit well with the ship's captain, and in February, 1992, the Captain advised ETC that he did not want Mr. Garner to return under his command because his knee injury interfered with his ability to do his assigned work. (A447-451).

As a result, ETC transferred Mr. Garner to the LNG AQUARIUS, on which he shipped from August 1992 until February 1993. During this voyage Mr. Garner concluded that his career was nearing an end because his knee caused him constant pain. (A452, 456-459).

Mr. Garner's elbow, furthermore, was increasingly symptomatic. The joint lacked flexion and extension, was sore and painful to the touch, and had developed crepitus. It had developed traumatic arthritis at a rate that surprised Dr. Sparks. (SA33-34).

When Mr. Garner saw Dr. Sparks on April 6, 1993, Dr. Sparks found that Mr. Garner's knee had totally collapsed.

Additionally, Mr. Garner's elbow presented ever-increasingly severe symptoms. Since at least June 1992, he had neurological dysfunction caused by entrapment of the ulnar nerve where it crossed the site of the fracture and displaced bone. By March 1993, x-rays showed severe degeneration in the elbow. (A1002).

Dr. Sparks performed knee replacement surgery on Mr. Garner on October 5, 1993 at Gadsden Hospital. This operation involved removing the end of the thigh bone, the top of the leg bone and the back part of the kneecap and installing artificial parts. (SA104-106). Dr. Sparks attributed the accident of January 17, 1991 to be the most likely cause of the ligament and meniscal tears he found in Mr. Garner's knee, and not the December 27, 1990 incident, when Mr. Garner fell from the porch. Dr. Sparks conceded that Mr. Garner had a pre-existing moderate three compartment osteoarthritis and chondromalacia dating back to 1989, but he further testified that this condition was not the cause of the traumatic injuries for which he treated Mr. Garner, nor was it the cause for him needing knee replacement surgery as soon as 1993. He opined that the conditions caused by the fall on January 17, 1991 caused Respondent to need the knee replacement surgery. (A983-992).

Though there was ample evidence of causation between the accident on January 17, 1991 and the traumatically induced arthritis leading to joint replacement, Dr. Sparks testified that in light of the arthritis that pre-existed the accident, Mr. Garner would eventually have needed a knee joint replacement within 5-10 years of October 1993. (A 992). Petitioner conceded that the knee arthroplasty totally disabled Respondent from again working at sea.

Without question, the case was hotly contested on nearly every fact presented. The testimony presented by Petitioner's primary liability witnesses, Captain Norman Smith and Chief

Mate Alan Barnes about the factors which caused the fall, the slippery deck, was directly contradicted by Mr. Garner, and further, by the independent testimony of his shipmate, Joseph Morrison, who corroborated much of Mr. Garner's testimony. Additionally, portions of the testimony of the Mate, Alan Barnes, and much of the documentary evidence, such as the company's purchase orders, requisitions and delivery documents show that this ship had no non-skid additive for use in painting for over a one-year period before the January 1991 accident. (Barnes, A227-228; 824-826). Thus, the jury had ample, strong evidence that the decks of the ship were dangerous.

After deliberating, the jury found Petitioner liable to Respondent, and awarded him $1.1 million in damages for the injuries he suffered in the two accidents. The strong weight of the evidence upon which they based their verdict was in Respondent's favor. For instance, in awarding $682,000 for past and future pain and suffering, it based its decision on a large body of evidence presented to it through Respondent's testimony and that of his wife, his doctor and his pastor.

Concerning the suffering endured by Mr. Garner with respect to his knee, in the January 17, 1991 fall on ship, Mr. Garner tore the medial collateral ligament, the medial meniscus and possibly caused, and definitely aggravated, a torn anterior cruciate ligament. As a result of these injuries he hobbled around the ship for two months in pain. (A401).

Mr. Garner, on March 19, 1991, underwent surgery to repair several of these conditions, followed by painful physical therapy. (Sparks, SA22-26).

He returned to work, and completed two more tours of duty, as his knee joint deteriorated. Within about two years, his knee went from having only moderate degenerative arthritis to totally

collapsing from the effect of the traumatic arthritis precipitated by the accident. This caused him excruciating pain whenever he moved his leg. He described this pain once in a sad telephone conversation with his wife. He had called from overseas, she related, and was crying as he told her that the terrible pain he had "was like walking like bone rubbing on bone". (A1159-1160).

When he finally had the knee replacement surgery, he again underwent a painful period of physical therapy followed by home exercises. His primary continuing therapy is walking. (A1133-1134). The pain he felt after the surgery he described as follows: "the first two days I have never experienced the pain of death. If pain could kill you, I would have felt like dying." (A462).

Additionally, even though there was evidence that in 5-10 years he would have needed the surgery anyway, there was no evidence that Mr. Garner, absent the traumatic arthritis induced by this fall, would ever have experienced the type and extent of pain he endured as a result of this fall up to the time of surgery.

For 5-10 years longer than otherwise, Mr. Garner will have endured having a mechanical joint in his body, one that he described as feeling "artificial". (A464). The prosthesis implant has left him with restricted motion, occasional swelling, and soreness. (Dr. Sparks, A1135-36; Garner A462-464). Additionally, Mr. Garner has the large, disfiguring scars caused by the surgery.

Worse still, however, is the fact that for 5-10 years longer than otherwise, he had to give up being a seaman, a job he loved. He feels humiliated — less of a man because he can not be the provider to his wife and young son that he feels he is supposed to be, and he has been under intense emotional stress. (A479).

In its poor attempt to paint the jury as having been "impassioned" by its award of an "excessive" verdict (an argument rejected by the district court and the Second Circuit), it is curious how Petitioner fails to discuss Mr. Garner's past and continuing pain and disability related to the comminuted fracture of the radial head of his elbow, which has lead to severe degenerative arthritis and an entrapped ulnar nerve. That injury presently causes him difficulties more extensive than that which he endures from his knee. (A465-466; A1138).

The jury, which included a physician, was not unduly sympathetic to Mr. Garner. They appreciated the physiological and psychological trauma Mr. Garner suffered in having two limbs severely disabled. Their award was the product of a rational deliberation, which the Court should not disturb.

In affirming the judgment, and finding the award not to be excessive, the Second Circuit relied upon its prior decision in *Scala v. Moore McCormack Lines, Inc.*, 985 F.2d 680 (2d Cir. 1993). In *Scala,* a similar situation was presented to the court as was presented here. There the plaintiff had suffered multiple traumas, including a knee injury and chronic back pain. The court found the jury's award of $1,500,000 for pain and suffering excessive, but it stated that $750,000 would be reasonable and fair compensation.

After verdict, Petitioner moved pursuant to Federal Rules of Civil Procedure 50 and 59 to set aside the verdict, or in the alternative, to enter judgment notwithstanding the verdict because the weight of the evidence, Petitioner claimed, did not support the verdict. The district court denied those motions, and Petitioner appealed to the United States Circuit Court of Appeals for the Second Circuit.

On appeal, Petitioner argued that the verdict was excessive and against the weight of the evidence, and that the trial court

had made reversible errors based upon purported prejudicial statements and "testimony" the district court judge supposedly made to the jury. The Second Circuit rejected these contentions, finding that Respondent received a fair trial but lost. It affirmed the judgment in all respects.

Respondent sought rehearing with a suggestion for rehearing *en banc*. These requests were summarily denied.

REASONS FOR DENYING THE WRIT

I.

THE PETITIONER WAS NOT DENIED A FAIR TRIAL BY THE DISTRICT COURT'S COMMENTS TO THE JURY ABOUT WITNESS MEMORY VERSUS INTENTIONAL FABRICATION.

During the trial, it became evident that Petitioner's key witnesses, Captain Norman Smith and Chief Mate Alan Barnes did not tell the truth. The jury rejected their testimony, not because of the district court judge's trial conduct, but because their falsehoods were exposed. The district judge gave a neutral jury charge concerning Smith's, Barnes's and Respondent's, credibility. The judge stated that it was the jury's duty to determine credibility, and in so doing, he described a legally acceptable view about witness intentional falsification compared to mistaken memory. Among other comments, the court said:

> What I think of the facts or don't think of the facts is wholly immaterial, and I don't intend to give you any impression of what I think the facts are.

(S24a).

Concerning credibility, the court said:

> The reason I don't like (using the word credibility) is it suggests if a witness is not credible, he or she is lying. Lying is sitting on the witness stand and saying something that the witness knows not to be true at the time he or she is saying it. Now, I don't have any idea whether or not that happened in this case. That is something for you to judge. It just has been my experience that, usually, that doesn't happen. Usually, the witness has convinced him or herself of what he or she is saying by the time he or she gets on the witness stand. That may be wrong, they may misremember things. That is for you to determine . . .

(S24a-25a).

Petitioner fails to recount that the court, again discussing witness credibility, also gave a "*falsus in uno*" charge. The court explained:

> Now, there is a charge called faultus (sic) in uno . . . It means, if you are false in one thing you can be deemed to be false in everything. That means if a witness sitting on that stand has testified to something you believe he has testified falsely, and it was to an important matter, you are entitled, if you want, to disregard that witness's testimony in its entirety. . . .

(RA4-5).[2]

---

2. Because some of the judge's charge relating to witness credibility (Cont'd)

The court then addressed Petitioner's major concern in this case, the supposed "inconsistent statements" Petitioner claims Mr. Garner made. The court gave the following instructions which, significantly, Petitioner fails to recount in its petition:

> Then there is a general rule about prior inconsistent statements. If a witness testifies to a fact and then is shown to have made a prior statement inconsistent with that fact, naturally you take into account the inconsistency in evaluating the witness's entire testimony. If you find that the inconsistency was deliberate and had a motive, then, naturally, you take that into account very seriously in considering the rest of the witness's testimony. If you decide, though, it is just a mistake or seems to the witness an unimportant matter, why then you evaluate it accordingly.

(RA5-6)

These portions of the charge which were not included in the petition, or the appendix annexed thereto, explained to the jury that if it found that a witness lied on any point, they could reject all of the witness's testimony. It also highlighted the impact prior inconsistent statements could have upon a witness's credibility.

When the statement about which Petitioner complains is read in context with the whole charge, it is clear that the judge

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(Cont'd)
was not included in the petition, those portions are reproduced in the appendix hereto. Citations to the appendix are designated as "RA __"

gave a neutral and accurate charge to the jury, and which was not prejudicial.

Of significance, Petitioner at trial did not object to the court's jury charge, thus, it did not preserve the issue on appeal.

Additionally, the court's comments about witness mis-recollection is a correct statement of the dynamics of witness testimony. Many courts recognize that a witness's recollections will be subject to many factors. For instance, in *Alamo v. Del Rosario,* 98 F.2d 328, 331 (D.C. Cir. 1938), the D.C. Circuit stated:

> The plaintiff in most personal injury cases was subjected, just before he was hurt, to excitement enough to explain mistakes of observation and memory . . . [T]he law recognizes the fact that parties, as well as other witnesses, may honestly mistake the truth, and requires juries to find the facts by weighing all the testimony whatever may be its source.

Alamo, 98 F.2d at 331.

In this case, the challenged statements by the district court, taken in conjunction with the district court's charge on interested witnesses, would have benefitted Petitioner more than Respondent, since, as the court noted, Mr. Garner and his wife were the most interested witnesses in the outcome of the case.

The district court told the jury:

> Obviously, to what extent does the witness have an interest in the outcome? Well, in this

> case, just about everybody who testified had an interest in the outcome, or could be presumed or found by you to have an interest in the outcome. Certainly, the plaintiff and his wife have an obvious interest: They want to you (sic) have give them money: when they get it, they will spend it. I can't think of a better interest in the outcome . . .

(S25a).

Finally, the court's statement that it had no opinion about the credibility of any witness, and advising it that it was their function to decide that issue, cured any prior infirmity in the charge. *Johnson v. Celotex Corp.*, 899 F.2d 1281, 1290 (2d Cir.), *cert. denied,* 111 S. Ct. 297 (1990).

II.

THE DISTRICT COURT DID NOT IMPROPERLY QUESTION MR. GARNER ABOUT HIS TESTIMONY.

Petitioner complains only about one, single interjection by the district court that Petitioner contends so affected the jury that Petitioner received an unfair trial. The facts belie the contention.

The incident in issue occurred when the trial judge sought clarification from Mr. Garner about whether he understood defense counsel's accusation that Mr. Garner lied when he signed the affidavit which contained purported inconsistencies.

What Petitioner fails to do is put the complained-about incident in context. Whether prejudice occurs during a trial must be judged by reviewing the trial as a whole. Mr. Garner's trial

consumed nine full trial days. The trial transcript consists of more than 1200 pages. Mr. Garner's testimony alone consumes over 400 pages of transcript, and took almost two full days to conclude.

The objected-to comments, in contrast, consist of four questions and a short statement by the court, taking up less than one page of the transcript. This event occurred at least six hours into the cross-examination of Mr. Garner. The sequence of events was as follows. Mr. Garner had acknowledged that his affidavit contained factual errors, and Petitioner's counsel then asked whether the affidavit was truthful. Mr. Garner said "no". The court, hearing the testimony and observing the demeanor of Mr. Garner, asked if Mr. Garner had meant to say that he intended to falsify the statement in the affidavit, and was admitting he lied when he signed it. It was evident that Petitioner's counsel was peppering him with leading questions, putting words into his mouth, the import of which Mr. Garner may not have appreciated. The relevant exchange is as follows:

> Q. Now, did you say the second paragraph of your affidavit of October 14th, 1992, that you mentioned to the chief made (sic) — and I will read it word for word — on 1/6/91, I mentioned to the chief mate that I had injured my knee at home, and my knee was swollen." Now, was that statement which you made in October 1992 under oath accurate?
>
> A. No, sir.
>
> Q. Was it truthful?
>
> A. No, sir.

> THE COURT: What do you mean by, "No, sir"?
>
> THE WITNESS: There is an explanation of that.
>
> THE COURT: "Truthful" means that you knew it was not true when you wrote. Is that what you intended to say?
>
> THE WITNESS: No, sir.
>
> THE COURT: It was mistaken?
>
> THE WITNESS: It was mistaken.
>
> THE COURT: So you did not realize what truthful meant when you answered that question?
>
> THE WITNESS: I am (sic) confused about that.

(S20a-21a)

To make sure that there was no misunderstanding as to what the court's purpose was in asking its questions of Mr. Garner, the court told the jury:

> Incidentally, understand that when I interrupt to question the witness, there is no importance to that, and I have no views one way or the other. It was a word he didn't understand.

(S21a).

The topic on which he was being cross-examined was whether Mr. Garner reported his accident at home by January 6 to the *Mate,* as the affidavit stated, or the *Captain,* as his trial testimony revealed. Clearly, it ultimately is irrelevant which senior officer it was to whom he reported the incident. The important thing was that Mr. Garner testified, consistent with his affidavit, that by January 6, 1991 he had reported to one of the senior officers that he had had a slight knee injury at home. Once the court's questioning was completed, furthermore, counsel chose not to explore what Mr. Garner did or did not "understand", nor did he probe any further about the issue of to whom Garner reported the home incident. Counsel failed to continue the inquiry, although the opportunity was available, into Mr. Garner's state of mind in preparing the affidavit, and the statements therein.

Additionally, counsel for Petitioner made no objection to the court's inquiry, thus, he did not preserve for appeal the issue.

In any event, if anything, the district court's inquiry merely attempted to clarify what Garner had said, or repeat that which he said, but the judge never imposed his own opinions or conclusions on the jury.

A role of the trial court is as follows:

> The trial court may actively participate and give its own impressions of the evidence or question witnesses, as an aid to the jury, so long as it does not step across the line and become an advocate for one side. Thus, we said nearly 80 years ago that a federal judge may express his or her opinion on the facts of a case so long as the judge makes it clear to the jury that they are the sole judge of those

> facts; but the judge should not become an advocate and argue the case for either side. See *Oppenheim v. United States,* 241 F. 625, 629 (1917). Because a federal trial judge is not a passive spectator or moderator, he or she retains the undoubted right to express his or her opinion of the facts to the jury; but if the court argues the case, it must argue it for both sides — the defendant's as well as the government's. See *Johnson v. United States,* 270 F. 168, 169 (2d Cir. 1920).

United States v. Filani, 74 F.3d 378 (2d Cir. 1996).

What constitutes impermissible judicial intervention, compared to appropriate inquiry, is shown in the contrast between *Filani* and the present case. While here the trial testimony lasted nine days and extends over 1200 pages of transcript, in *Filani,* the entire trial took one day. Here the Respondent's testimony consumes over 400 pages, while in *Filani,* the defendant's testimony was only 60 pages long. In *Filani,* the trial court's improper cross-examination of the defendant occurred on 25% of those pages, during which there were repeated interruptions by the trial judge who showed his bias against the defendant. By contrast, here the complained about portion of the transcript consists of four questions and one comment on one page of the transcript. This is hardly the "repeated interference with the defense case" found in *Filani* to have warranted reversal. As the Second Circuit noted, the reviewing court "must take care not to focus on isolated episodes, but to assess the trial court's inquiries in light of the record as a whole." *Filani* 74 F.3d at 386.

The district court has broad discretion to interrogate witnesses to clarify issues and aid the understanding of the jury,

even those that touch upon matters that relate to credibility. If a court's questioning is of short duration in a long trial, and the court gives a curative instruction that he had no opinion about any witness's credibility, it is totally acceptable for the court to ask questions of witnesses. *United States v. Manko*, 979 F.2d 900 (2d Cir. 1992), *cert. denied*, 509 U.S. 903, 113 S. Ct. 2993 (1993); *Berkovich v. Hicks*, 922 F.2d 1018, 1025 (2d Cir. 1991); *Johnson v. Celotex Corp.*, 899 F.2d 1281, 1290 (2d Cir.), *cert. denied*, 498 U.S. 920, 111 S. Ct. 297 (1990).

Looked at as a whole, Petitioner here received a fair and impartial trial. If anything, furthermore, the court's inquiry was mere harmless error, and thus must be overlooked, Rule 61, Federal Rule of Civil Procedure.[3] As the Second Circuit stated in affirming the judgment, "[w]e find the judge's comments, while less than desirable, did not compromise the fairness of the trial to the defendant." (SA3a).

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3. Rule 61 states, "No error in either the admission or the exclusion of evidence, and no error or defect in any ruling or order or in anything done or omitted by the court . . . is ground for granting a new trial . . . unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

CONCLUSION

In this matter, a jury found against Petitioner and in favor of Respondent. The district court thereafter heard Petitioner's motion for a new trial, which it denied. In affirming that denial, the Court of Appeals for the Second Circuit correctly reviewed the district court's actions, and affirmed the judgment against Petitioner. Because Petitioner received a fair trial below, the petition should be denied.

Respectfully submitted,

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APPENDIX A — EXCERPTED JURY CHARGE

[Commencing at page 1178]

That's the end of Bob Hope. We will get down to business.

In the first place, I will ask the clerk to circulate among you a copy of the verdict sheet that you are going to have to answer at the end, and I will refer to it from time to time.

You might as well read it to yourselves and I will refer to it.

(Pause)

THE COURT: That gives you a general idea of what you are going to be up to. I will refer to it as we go along.

In the first place, let me remind you what I said way at the beginning with respect to the division of functions between you and me. You are supreme on the facts, and I have to deal with the law. What I think of the facts or don't think of the facts is wholly immaterial, and I don't intend to give you any impression of what I think of the facts are. Don't read into the order I say things or the way I say things any impression I may have. Because, as I told you, my theory of how the jury system works is that each of us does our own job and doesn't pay any attention to how the other one is doing his or her job.

Now, the first responsibility is finding out the facts. Your responsibility is findings out the facts. The [1179] first thing you want to do is judge the credibility of the witnesses. I don't happen to like the use of the word "credibility," because but I can't think of any other word, so I have to use it.

The reason I don't like it is it suggests if a witness is not

credible, he is lying, or she, and I have no way of knowing whether that happened in this case. Lying is sitting on the witness stand and saying something that the witness knows not to be true at the time he or she is saying it. Now, I don't have any idea whether that happened in this case or it didn't. That is something for you to judge. It just has been my experience that, usually, that doesn't happen. Usually, the witness has convinced him or herself what he or she is saying by the time they get on the witness stand, and that is to about the extent of it. That may be wrong, they may misremember things. That is for you to determine. But I will come back to that again shortly.

How do you judge the credibility? You judge credibility the way you do in your daily lives. You are always called upon to judge credibility of the people you are dealing with, that is, judge the extent that you want to rely on what they say. Do they know what they are talking about? Have they any intention to deceive you or any interest in deceiving you? When I say intent, that implies lying, and that is usually not what I think happens. Do [1180] they have any interest in deceiving you? Do they seem to know what they are talking about, and so on?

That is what you do here in the formal atmosphere of the courtroom. You have direct and cross-examination. Does the witness seem to you to be acting more or less alike on direct and cross-examination? Or when it comes to cross-examination, does he seem, he or she seem to adopt a different attitude, suggesting that he may have consciously or subconsciously be trying to deceive you. Or on cross-examination, does he or she seem to be trying to answer questions, not trying to convey impressions? That is something for you to consider.

Obviously, to what extent does the witness have an interest

in the outcome? Well, in this case just about everybody who testified had an interest in the outcome, or could be presumed or found by you to have an interest in the outcome. Certainly, the plaintiff and his wife have an obvious interest: They want to you have give them money; when they get it, they will spend it. I can't think of a better interest in the outcome. Presumably you may find the defendants — none of the defendants have, as far as we know, any pecuniary interest personal to them, but people have interests in defending people they work for and their reputation with the people they work for. All those things are for you to weigh.

[1181] Obviously, you don't just regard what an interested person tells you. If you did that in your daily life, you wouldn't listen to what anybody told you. Unless somebody is on stage or a talk show, everybody who talks to you has an interest in having you act on what they say. And over the years, you kind of develop antennae, so that you don't analyze it out all the time but you develop antennae for deciding whether a person you are talking about should be relied upon on a particular subject that he or she is talking about. Some people are completely reliable in general but aren't reliable on specific subjects.

All those kind of things you deal with everyday in your life, and, as I say, you develop kind of antennae as to how to evaluate them. The difference between ordinary life and a lawsuit and jury service is that, for jury service, you have twelve. As an individual, each one of you is deciding the case, or if I were deciding the case, all each of us would have is our own antennae. You have eight, or rather ten. You have ten, and the law says, and I believe correctly, that justice is more likely to come about if all of you pool your impressions and discuss it with each other and try to come out with a common understanding of how things are.

Appendix A

Now, there is a charge called faultus in uno. We lawyers love to use the Latin language. It means, if you [1182] are false in one thing you can be deemed to be false in everything. That means if a witness sitting on that stand has testified to something you believe he has testified falsely, and it was to an important matter, you are entitled, if you want, to disregard that witness's testimony in its entirety. Just pretend that that witness never testified. But you don't have to do that. You can say, Well, I will be on my guard, that witness told a deliberate lie on this subject, I will be on my guard, but I will judge the rest of their testimony and see where I think it goes.

But, again, it is what you do in daily life. Someone can tell you such an you outrageous lie you might say, I am never going to listen to that person again, I haven't got time. Or they may tell you an outrageous lie and you figure out what motivated that lie and decide it is not likely to be motivated again, and I will be on my lookout and listen to what that person says, and with due caution decide whether or not to rely on it or not. That is exactly the way it is here.

Then there is a general rule about prior inconsistent statements. If a witness testified to a fact and then is shown to have made a prior statement inconsistent with that fact, naturally you take into account the inconsistency in evaluating the witness's entire testimony. If you find that the inconsistency was [1183] deliberate and had a motive, then, naturally, you take that into account very seriously in considering the rest of the witness's testimony. If you decide, though, it is just a mistake or seems to the witness an unimportant matter, why then you evaluate it accordingly.

* * *

No. 96-665

Supreme Court, U.S.
FILED
DEC 2 1996
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

ENERGY TRANSPORTATION CORPORATION,

Petitioner,

—v.—

JIMMIE GARNER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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ARGUMENT

This petition involves a $1,100,000 jury verdict following trial in which the presiding judge testified "It was a word ["truthful"] he [respondent] didn't understand" and "Lying . . . usually that doesn't happen" which he refused to set aside as contrary to the weight of evidence despite his belief expressed out of the jury's hearing: "I think the facts are entirely different from what he [respondent] testified to". In his answering brief, respondent says: "Petitioner submitted evidence that it claimed impeached the evidence presented by Respondent" which "contentions were rejected by the jury", an assertion that jury findings of fact are final. He also claims: "After the jury verdict, the district court considered, but denied, Petitioner's motion for a new trial . . . ." but does so without acknowledging: (1) In the Second Circuit it is an abuse of discretion for a trial judge to grant such a motion if in doing so he or she disagrees with the jury's evaluation of credibility; and (2) in *Gasparini v. Center for Humanities, Inc.*, 518 U.S. ___, 135 L.Ed.2d 659, 677 (1996) this Court held: "In keeping with the historic understanding, the re-examination clause does not inhibit the authority of trial judges to grant new trials for any of the reasons for which new trials have . . . been granted in actions at law in the courts of the United States". In effort to show "[e]ssentially" the ". . . Petitioner receive[d] a fair trial" respondent demonstrates why it did not; and precisely how the trial judge's testimony had most harmful impact. By arguing "facts" which distort the record shamefully, respondent shows why trial judges must have "large" discretion to grant new trials where the verdict even might be based upon false evidence. He also proves why reexamination of facts found by the jury is an essential Due Process protection by demonstrating the extent to which his proof was only "consistent with" a particular inference or document and as a result only seems to have weight but, in fact, has none.

Respondent asserts: "During the trial, it became evident that Petitioner's key witnesses . . . did not tell the truth" and that "[t]he jury rejected their testimony, not because of the district court judge's trial conduct, but because their falsehoods were exposed", a claim belied by his attorney's statement in summation that he ". . . can't say" petitioner's fact witnesses "didn't believe the things they told you" because it had been necessary for them to "reconstruct" their testimony based upon "documents with numerous errors" (A1349). Respondent then claims that the charge to jury "described a legally acceptable view about witness intentional falsification compared to mistaken memory" which he claims was not error for the further reason that the judge said he had no "impression of what . . . the facts are" as well as: "Now I don't have any idea whether that happened in this case." Ignoring the fact that if he had "no way of knowing whether that happened in this case" the judge could have no reason to believe either that lying had or had not occurred in any other, respondent also claims that the *falsus in uno* charge corrected any error although it establishes that the judge does not know—but nonetheless told the jury was fact—had fundamental impact upon its assessment of credibility in a case which respondent states: "Without question . . . was hotly contested on nearly every fact presented" (Respondent's Brief, p. 8). Immediately after telling the jury his "legally acceptable view" the trial judge charged: ". . . if you are false in one thing you can be deemed to be false in everything" as well as ". . . if a witness sitting on that stand has testified . . . falsely, and it was to an important matter, you are entitled . . . to disregard that witness's testimony in its entirety". Respondent admitted that "in certain material respects" his October 14, 1992 affidavit given his own attorney contradicted his testimony and specifically that his statement: "On 1/6/91, I mentioned to the chief mate that I injured my knee at home, and my knee was swollen" was not "truthful" as well as not "accurate" (20a). His affidavit "was an important matter" a fact proven by respondent's claim:

"The court then addressed Petitioner's major concern in this case, the supposed 'inconsistent statements' Petitioner claims Mr. Garner made". Respondent next describes a matter which petitioner "fail[ed] to recount" in its petition—the "general rule about prior inconsistent statements"—in which the judge told the jury: "If you find that the inconsistency was deliberate and had a motive, then, naturally, you take that into account very seriously in considering the rest of the witness's testimony" while to the contrary: "If you decide, though, it was just a mistake or seems to the witness an unimportant matter, why then you evaluate it accordingly".

After Mr. Garner responded "No, sir" to petitioner's question whether his affidavit was "truthful", the judge intervened to offer his own explanation "It was mistaken". There is no doubt that by asking a "question" that couldn't have been more exculpatory the judge satisfied the jury that it needn't consider whether ". . . the inconsistency was deliberate . . . ." Instead, he assured it, directly contrary to respondent's testimony, that Garner's admission of perjury prior to trial was "just a mistake". He therefore also showed the jury why it shouldn't conclude that the inconsistency between what respondent said at trial and the facts sworn to in his affidavit ". . . had a motive" and, hence, would be but for the judge's intervention a matter which the jury should "take into account very seriously in considering the rest of . . . [his] . . . testimony". In fact, if inconsistency was "just a mistake", the fact that the jury was told it should "evaluate it accordingly" meant it should ignore inconsistency and not disbelieve the rest of respondent's testimony. The trial judge, however, went even further by telling the jury that "truthful" was "a word [respondent] didn't understand". He therefore relieved him of his admission of false swearing and as a result removed the "if a witness sitting on the stand has testified falsely" *falsus in uno* predicate for the jury's right "to disregard that witness's testimony in its entirety". The judge did so after he recognized that respondent had admitted perjury. During oral

argument of its new trial motion, petitioner claimed: "Jimmie Garner in the course of cross-examination admitted that he perjured himself in that affidavit" by agreeing that ". . . the affidavit was not only inaccurate but also said it was untruthful" to which the judge responded: "That is not necessarily perjury unless he knew it was untruthful at the time he said it" (10a). In his answering brief respondent *agrees* that he admitted committing perjury. His attorney claims that when "Mr. Garner said 'no' [ ] [t]he court . . . asked if Mr. Garner had meant to say that he intended to falsify the statement in the affidavit, and was admitting that he lied when he signed it" (Brief, p. 17), a concession that what he, in fact, had said included admission of intention to falsify, making what he had "meant to say" irrelevant; and the court's questions did not clarify respondent's testimony, they changed it. Thus, respondent himself has proven that the "comments" immediately thereafter: "That's it, no more discussion" and only a very brief time later: "It was a word he didn't understand" (21a) were gross and utterly inexplicable error. That conceded, respondent, for the first time in his brief in this Court claims that what he admitted was not "truthful" was not "important".

Respondent now claims (Brief, p. 19): "The topic on which he was cross-examined was whether Mr. Garner reported his accident at home by January 6 to the *Mate*, as the affidavit stated, or the *Captain*, as his testimony revealed" (emphasis in original) and: "Clearly, it ultimately is irrelevant which senior officer it was to whom he reported the incident" because "[t]he important thing was that Mr. Garner testified, *consistent with* his affidavit, that by January 6, 1991 he had reported to one of the senior officers that he had had a *slight* knee injury at home" (emphasis added). Although the captain never claimed that he had examined respondent's knee after he was told of his accident at home and had nothing to do with the preparation of the medical log, respondent's counsel's claimed in summation, that "Mr. Garner was being

penalized for his honesty" (A1328-9) in telling the captain of his knee injury at home (A349). Respondent admitted that when he signed it he had known that the medical log (Ex. "24", A1577) spoke of the condition of his knee on January 6, 1991 (A639-40, A706-9). In his affidavit, Mr. Garner admitted that "[o]n 1/6/91" the chief mate "gave me Ibuprophen 800 mg, one tablet three times a day", "placed in his report [i.e., the medical log a copy of which respondent at the time his affidavit was executed had (A380)] 'light duties, stay off knee as much as possible' " and that he "was given an ace bandage". Respondent claimed at trial that Ibuprophen had been left on his desk on January 6, 1991 (A352-53) although the mate did not examined his knee before his shipboard injury (A374-5) and also testified that he was not given an ace bandage until January 18, 1991 (Ibid.). Before totally contradicting its contents by testifying that when, allegedly on January 22, 1991, respondent signed it he believed it was "consolidated" with description of treatment after his January 17, 1991 accident, his counsel introduced the question of the medical log's accuracy by saying: "I want to turn to one of the critical issues in this case" (A342). The mate prepared the log and it was he who testified that on January 6, 1991 and repeatedly thereafter before his alleged shipboard injury respondent's knee was in "terrible shape" (A196). It is because the mate upon hearing of a seaman's injury before joining would surely have examined and would not likely have given Ibuprophen or an ace bandage without doing so, that respondent's denial, both that the mate had examined on the date the log indicates or at any time until after January 17, 1991 (A628-30), was so significant. In fact, the Injury Report, Ex. "10" (26-27a), identifies the date of respondent's injury as December 27, 1990. For these reasons, respondent *had to* claim that the mate had had no reason to examine because not told of his fall at home. (A380-1). This was crucial because he asserted that his knee was free of symptoms as of June 8, 1991, a "fact" assumed by his doctor in testifying to his opinion regarding connection between the injury in suit and need

for disabling knee replacement surgery more than two years later. But why if contrary to what the medical log states he did not have a "swollen, sprain to left knee" on January 6, 1991 would respondent swear in his affidavit "I believe my employer was negligent . . . in allowing me to stay on the ship after 1/13/91" when the vessel reached its first port after he joined? And why would the mate falsify a medical log when to do so is a violation of 46 U.S.C. 11301 and, hence, a basis for revocation of his license?

Respondent's "consistent with" testimony included effort to qualify Ex. "20" (A1573), a requisition for a shipyard repair of the No. 4 winch on the ship's port side between cargo tanks Nos. 1 and 2, in order to "prove" the existence of a "fine residue of oil" on the deck "not far from" the "Nos. 1 and 2 winches, and the two anchor windlass on the foredeck" which allegedly the chief mate "confirmed. . .all were experiencing oil leakage problems" (Brief, p. 3). In fact, the chief mate testified that: "I can't specifically remember any specific winch oil leak problems. We had oil leak problems on winches, primarily up on the foredeck and the anchor windlass, and the number 1 and 2 winches, which were on the foredeck. I know there were oil leak problems there, but I don't recall oil leak problems, winches number 3 and 4 . . ." (A827). As plaintiff's Exhibit "1" (A1518), a photograph of the vessel with marking made prior to trial by respondent or his counsel, shows respondent allegedly fell on January 17, 1991 just aft of where No. 1 tank begins, a considerable distance along the length of the 998' vessel (A567) from where "on the forepeak" the Nos. 1 and 2 mooring winches and the anchor windlasses are located. Although respondent knew the only alleged fact that it was leaking and of his duty to be vigilant regarding clean up (A597), on January 18, 1991, the master, according to respondent, asked him to walk out on deck with him a distance of 650' (A593-7) on a "very high priority job" (A382) in order to visit the No. 4 winch. While on deck aft of the No. 1 tank directly across from where on

the vessel's starboard side respondent's March 13, 1991 accident occurred—and the length of No. 1 tank further aft of where Exhibit 1 indicates his knee injury happened—respondent observed that a "coupling" to the winch's "hydraulic tank" had been "put in [ ] backwards" at "the prior shipyard". At that time the master supposedly said this resulted in "a leaky winch" and contamination of the deck where Garner allegedly slipped. The master then added that the defect causing the leak could be fixed only in shipyard and not aboard ship. (A383). Thus, through his oral testimony respondent sought to establish a basis for admission of Ex. "20" which described the defect in the No. 4 winch but which said nothing concerning whether as result it leaked. This offer was rejected (A384-5) but upon cross-examination of the master, respondent's counsel tried again to establish that the defect described in the repair requisition could cause a hydraulic fluid leak, a fact Captain Smith denied (A1256-7) and he, of course, never called a witness to say to the contrary that it could. Respondent so testified although at his deposition he had admitted that he couldn't say that oil from the allegedly leaking winch had "played any role" in causing his January 17, 1991 alleged fall (A589). This contradiction was explained because he didn't then have the "work log" (Ex. "12", A1565-9) and "had no way of proving" what he "needed . . . [to] . . . prove" (A699-700). This "proof" is described in respondent's brief (p.3) as: "The deck work log . . . recorded that where Mr. Garner fell was thoroughly cleaned and degreased two days after his accident" although this area was "between tank Nos. 1 and 2" (A1568, 1/19/91 entry) and, hence, the length of No. 1 tank aft of where Ex. "1" shows his accident occurred. Respondents claim of liability for his knee injury is therefore inconsistent with his sworn testimony prior to trial but allegedly "consistent with" a ship's record. Respondent also offered a receipt (Ex. "25", A1590) for "deck degreaser" received aboard ship April 1, 1991 as evidence that his March 13, 1991 elbow injury had been caused by its absence prior to delivery. In his brief in the

court of appeals (pp. 25-6) respondent established that "consistent with" was not a proper basis for admission of Ex. "25"—he claimed that the jury could believe that delivery was "more than mere coincidence" and, hence, could speculate that because degreaser was received on the ship so soon after his accident it had run out at the time of his elbow injury. In addition, respondent's assertion there was ". . . ample, strong evidence that the decks of the ship were dangerous" (Brief, p.9) is based on "consistent with" absence of records of delivery of "non-skid" additive and the testimony of a shipmate, Joseph Morrison. Respondent claims that this witness, who the trial judge said "clearly committed perjury" (A817), "testified that the deck where . . . [respondent] . . . fell was devoid of functional non-skid paint" (*Ibid.*, p. 3). Morrison agreed that "[t]here was no nonskid in the paint" (A723) in response to a question by respondent's counsel who at the time had a statement (Ex. "71", A1729) in which this witness had said to the contrary: "there was not enough non-skid sand mixed with the paint" and as a result respondent's brief is also only "consistent with" the facts. Whether there was no, or, instead, not enough, non-skid material was important because it is added to deck paint (A688, A723) under the bosun's supervision and respondent had served aboard the vessel in that capacity previously (A422-3). Although none of this proves that the jury's verdict was necessarily wrong, there is no doubt that "consistent with" raises a most serious issue of weight of evidence and in this case there was proof in addition of respondent's perjury—In referring to his affidavit he also said: "I totally disagreed with it" (A569), testimony confirming that he knew its contents were false when he signed it. Because it is not believable that an affidavit given by a party to his attorney would be materially inaccurate, respondent had to admit that he had known that it was also not "truthful". Doing so benefitted his case because the trial judge's personal accommodation to his powerlessness in the face of perjury is to insist that it has and does not occur.

Respondent says correctly that "counsel for petitioner made no objection to the Court's inquiry" beginning with "What do you mean by 'No, sir' " but wrong to say the issue was not preserved for appeal. Rule 605 F.R.Evid. provides: "No objection need be made in order to preserve the point". The judge, not respondent, testified: "It was a word he didn't understand" and that "fact" would not have been known to the jury had he not, despite which respondents assert "the judge never imposed his own opinions or conclusions on the jury" (Brief, p. 19). In addition, respondent claims that "petitioner at trial did not object to the court's jury charge" that in its experience "lying . . . usually that doesn't happen" although it objected during jury deliberations. (A1467). Of course, the trial judge's statement concerning his "experience" could not more clearly be evidence—the jury would not have known that "lying . . . usually that doesn't happen" had this "comment" not been made. Rule 605 F.R.Evid. excuses objection to judicial testimony since damage to reputation by effort to withdraw a statement of fact made to the jury by the trial judge would be too great and effective retraction would in any event be impossible.

More importantly, respondent, by failing to address the Rule 59(a) F.R.Civ.P. issue and, hence, the question of U.S. Const. *Amend V* Due Process, expects that the revolution achieved by the courts of appeals—making jury fact-finding unreviewable when weight of even "consistent with" proof depends upon credibility in "hotly contested" cases—will be embraced by this Court despite the fact that mistaken efforts to achieve "judicial economy" have the opposite effect and, far worse, cause loss of respect for the judiciary. Even before this Court, respondent argues that a verdict dependent upon testimony only "based upon truth" because "consistent with" other evidence which, in fact, is non-corroborative or impeaching, is good enough. But what else could he say? He certainly cannot claim that the Second Circuit is right to abolish Rule 59(a) F.R.Civ.P. in weight of evidence cases, that the

judge did not testify or that his affidavit was truthful because if it is his verdict was the result of fraud.

What respondent seems not to understand is that his misrepresentation of facts and their significance leads inevitably to consideration who best can distinguish whether "consistent with" proof has *any* probative value or, instead, is *totally* without weight; or whether it is *itself* evidence that the underlying claim is false. Although the answer in the ordinary case is the trial judge, asking, as respondent has, this Court to weigh "consistent with" evidence although neither it nor the courts of appeals can do so is the *best* argument why final decision on a new trial motion based on weight of evidence must depend upon the free exercise of discretion of the judge who tried the case. It is also clear that if this trial judge had discretion despite his personal opinion, and been permitted to exercise it, this case might not even have been appealed, thus demonstrates that the Second Circuit's "law" disserves even its apparent goal of "judicial economy". In *Gasparini v. Center for the Humanities*, *supra*, this Court considered the history of re-examination clause and this case proves what *will happen* if the wise interpretation this Court has always given it is not reaffirmed. In the Second Circuit it appears to make no difference whether a verdict is just or, instead, based upon false testimony, which is why this verdict was not set aside and the decision not to was affirmed. There is no doubt that neither the district court nor the court of appeals reexamined the facts found by the jury and as a result respondent's judgment could not be affirmed, were there no error during trial, without depriving petitioner of U.S. Const. V due process of law. *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994).

CONCLUSION

A writ of certiorari to the Court of Appeals for the Second Circuit should be granted.

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